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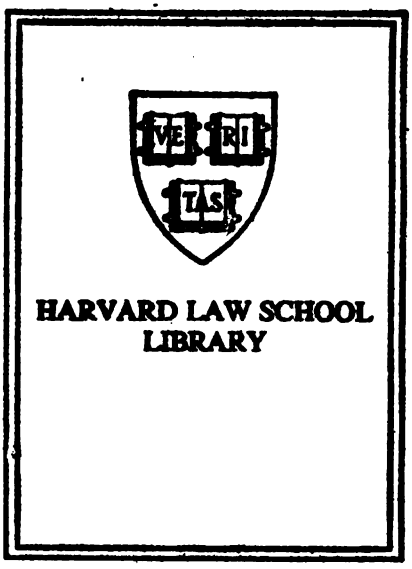

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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF MONTANA.

FROM DECEMBER 12, 1908, TO APRIL 12, 1909.

OFFICIAL REPORT.

VOLUME 38.

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The opinions in this volume of the Montana Reports have been edited and are reported, under the supervision of the Justices, by Mr. A. C. Schneider, a member of the bar of the supreme court.

JUSTICES

OF

THE SUPREME COURT OF THE STATE OF MONTANA,

DURING THE TIME OF THESE REPORTS.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. HENRY C. SMITH,
*THE HON. WILLIAM L. HOLLOWAY,
} Associate Justices.

OFFICERS OF THE COURT:

ALBERT J. GALEN, Attorney General.

W. H. POORMAN, First Asst. Attorney General.

EDGAR M. HALL, Second Asst. Attorney General.

WILLIAM L. MURPHY, Third Asst. Attorney General.

JOHN T. ATHEY, Clerk.

MARSHALL N. RACE, Marshal.

AUGUST C. SCHNEIDER, Court Stenographer.

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*Re-elected November 3, 1908.

ATTORNEYS AND COUNSELORS AT LAW

Admitted from February 1, 1909, to July 3, 1909.

ADAMS, CHESTER A., April 3, 1909.
ARMOUR, R. M., April 5, 1909.

BUNTIN, C. W., June 7, 1909.

CALDER, W. L. A., June 8, 1909.
COHEN, M. S., June 7, 1909.
COUSER, LOUIS A., May 28, 1909.
CRUM, CHARLES L., March 25, 1909.
CUTLER, HAROLD B., June 7, 1909.

DARBY, JOSEPH M., June 16, 1909.
DUFF, JOHN C., June 7, 1909.
DUGRO, CHARLES H., March 1, 1909.
DUNBAR, MARION E., May, 10, 1909.

FERGUSON, ROBERT, July 3, 1909.

HAVEN, LOUIS E., June 7, 1909.
HUNT, ROLLO F., April 17, 1909.

JOHNSON, JOHN L., May 13, 1909.
JOHNSTON, G. L., June 7, 1909.

MALOY, CHARLES E. H., March 25, 1909.
MARQUETTE, JOHN J., March 6, 1909.
MCCARTY, W. P., June 7, 1909.
MCCOY, GUY R., April 8, 1909.

MCKINNON, STEVE D., June 22, 1909.

O'BRIEN, PATRICK J., June 7, 1909.
O'FLYNN, EDWARD F., March 27, 1909.

PATTERSON, JAMES F., April 16, 1909.
PIER, EDWIN S., June 1, 1909.

QUIGGLE, EDMUND B., June 7, 1909.

RAMSDELL, J. WALTER, June 7, 1909.
RANKIN, WELLINGTON D., July 3, 1909.
REYNOLDS, FRANK B., April 29, 1909.
REYNOLDS, R. J., June 7, 1909.
RICE, MONTGOMERY C., June 14, 1909.
ROWLAND, M. D., April 24, 1909.

SCHMITZ, FRED. W., March 10, 1909.
SILVERMAN, S. J., June 7, 1909.
STANTON, EUGENE F., June 7, 1909.

TAYLOR, JAMES D., February 10, 1909.
TENNER, EDWARD, March 2, 1909.
THOMPSON, CARL N., June 26, 1909.
TYLER, C. H., April 12, 1909.

VETLESON, MARTIN, June 16, 1909.

WALKER, FRANK C., July 3, 1909.

DIRECTORY

OF THE

JUDICIAL DISTRICTS OF THE STATE OF MONTANA.

1909.

First Judicial District.

County of Lewis and Clark. County Seat, Helena.

District Judges: Hon. James M. Clements; Hon. J. Miller Smith.

Officers: County Attorney, H. S. Hepner, Esq.; Clerk of District Court, F. L. Reece; Sheriff, M. L. Higgins.

Second Judicial District.

County of Silver Bow. County Seat, Butte.

District Judges: Hon. Michael Donlan; Hon. J. J. Lynch; Hon. J. B. McClernan.

Officers: County Attorney, Thomas J. Walker, Esq.; Clerk of District Court, John J. Foley; Sheriff, John K. O'Rourke.

Third Judicial District.

Counties of Deer Lodge, Powell and Granite.

District Judge: Hon. George B. Winston.

Officers of Deer Lodge County (County Seat, Anaconda)—County Attorney, W. H. Trippet, Esq.; Clerk of District Court, Barney Hogan; Sheriff, James O'Keefe.

Officers of Powell County (County Seat, Deer Lodge)—County Attorney, S. P. Wilson, Esq.; Clerk of District Court, R. Lee Kelly; Sheriff, Jos. E. Neville.

Officers of Granite County (County Seat, Philipsburg)—County Attorney, W. E. Moore, Esq.; Clerk of District Court, George O. Burke; Sheriff, John D. Kennedy.

FOURTH JUDICIAL DISTRICT.

Counties of Missoula, Ravalli and Sanders.

District Judges: Hon. F. C. Webster; Hon. Henry L. Myers.

Officers of Missoula County (County Seat, Missoula)—County Attorney, Ed. C. Mulroney, Esq.; Clerk of District Court, Thos. R. Conlan; Sheriff, Davis Graham.

Officers of Ravalli County (County Seat, Hamilton)—County Attorney, R. Lee McCullough, Esq.; Clerk of District Court, A. C. Baker; Sheriff, Wm. Ward.

Officers of Sanders County (County Seat, Thompson Falls)—County Attorney, H. C. Schultz; Clerk of District Court, W. E. Nippert; Sheriff, Clyde E. Baker.

FIFTH JUDICIAL DISTRICT.

Counties of Beaverhead, Jefferson and Madison.

District Judges: Hon. Llewellyn L. Callaway; *Hon. Joseph B. Poindexter.

Officers of Beaverhead County (County Seat, Dillon)—County Attorney, Henry R. Melton, Esq.; Clerk of District Court, F. A. Hazelbaker; Sheriff, O. C. Gossman.

Officers of Jefferson County (County Seat, Boulder)—County Attorney, D. M. Kelley, Esq.; Clerk of District Court, Wm. T. Sweet; Sheriff, P. J. Manning.

Officers of Madison County (County Seat, Virginia City)—County Attorney, Julian A. Knight, Esq.; Clerk of District Court, Matt. Carey; Sheriff, N. J. Traufler.

SIXTH JUDICIAL DISTRICT.

Counties of Park and Sweet Grass.

District Judge: Hon. Frank Henry.

Officers of Park County (County Seat, Livingston)—County Attorney, O. M. Harvey, Esq.; Clerk of District Court, Arthur Davis; Sheriff, H. McCue.

*Appointed March 5, 1909, pursuant to Act approved March 4, 1909 (Laws 1909, p. 121), authorizing the appointment of an additional judge for the Fifth Judicial District.

Officers of Sweet Grass County (County Seat, Big Timber) —County Attorney, J. T. Vaughan, Esq.; Clerk of District Court, F. M. Lamp; Sheriff, O. A. Fallang.

SEVENTH JUDICIAL DISTRICT.

Counties of Custer and Dawson.

District Judge: Hon. Sydney Sanner.

Officers of Custer County (County Seat, Miles City)—County Attorney, S. Walker, Esq.; Clerk of District Court, James G. Ramsey; Sheriff, H. R. Wells.

Officers of Dawson County (County Seat, Glendive)—County Attorney, F. P. Leeper, Esq.; Clerk of District Court, Harry A. Sample; Sheriff, A. Larson.

EIGHTH JUDICIAL DISTRICT.

*Counties of Cascade and Teton.

District Judges: Hon. Jere B. Leslie; †Hon. Harry H. Ewing.

Officers of Cascade County (County Seat, Great Falls)—County Attorney, J. W. Speer, Esq.; Clerk of District Court, Geo. Harper; Sheriff, John A. Collins.

Officers of Teton County (County Seat, Chouteau)—County Attorney, P. I. Cole, Esq.; Clerk of District Court, S. McDonald; Sheriff, K. McKenzie.

NINTH JUDICIAL DISTRICT.

Counties of Gallatin and Broadwater.

District Judge: Hon. W. R. C. Stewart.

Officers of Gallatin County (County Seat, Bozeman)—County Attorney, Ben. B. Law, Esq.; Clerk of District Court, J. A. Johnston; Sheriff, A. H. Sales.

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*By Act approved February 22, 1909 (Laws of 1909, p. 31), Teton County was detached from the Eleventh Judicial District and added to the Eighth Judicial District, and provision made for the appointment of an additional judge for the district. The Act makes it incumbent upon one of the judges of the district to maintain chambers at Chouteau, Teton County.

†Appointed March 4, 1909.

Officers of Broadwater County (County Seat, Townsend)—County Attorney, J. A. Matthews, Esq.; Clerk of District Court, F. Bubser; Sheriff, W. T. Deadmond.

TENTH JUDICIAL DISTRICT.

Counties of Fergus and Meagher.

District Judge: Hon. E. K. Cheadle.

Officers of Fergus County (County Seat, Lewistown)—County Attorney, John C. Huntoon, Esq.; Clerk of District Court, J. B. Ritch; Sheriff, Ed. Martin.

Officers of Meagher County (County Seat, White Sulphur Springs)—County Attorney, W. L. Ford, Esq.; Clerk of District Court, F. H. Mayn; Sheriff, Geo. L. Williams.

ELEVENTH JUDICIAL DISTRICT.

*County of Flathead.

District Judge: Hon. John E. Erickson.

Officers of Flathead County (County Seat, Kalispell)—County Attorney, J. H. Stevens, Esq.; Clerk of District Court, Sam. D. McNeely; Sheriff, W. H. O'Connell.

TWELFTH JUDICIAL DISTRICT.

Counties of Chouteau and Valley.

District Judge: Hon. John W. Tattan.

Officers of Chouteau County (County Seat, Fort Benton)—County Attorney, F. A. Carnal, Esq.; Clerk of District Court, C. H. Boyle; Sheriff, Frank McDonald.

Officers of Valley County (County Seat, Glasgow)—County Attorney, Thos. Dignan, Esq.; Clerk of District Court, C. C. Beede; Sheriff, S. C. Small.

THIRTEENTH JUDICIAL DISTRICT.

Counties of Carbon, Rosebud and Yellowstone.

District Judge: Hon. Sydney Fox.

*By Act approved February 22, 1909 (Laws 1909, p. 31), Teton County was detached from the Eleventh Judicial District and added to the Eighth Judicial District.

Officers of Carbon County (County Seat, Red Lodge)—County Attorney, A. C. Spencer, Esq.; Clerk of District Court, H. A. Simmons; Sheriff, F. S. Bachelder.

Officers of Rosebud County (County Seat, Forsyth)—County Attorney, Geo. A. Horkan, Esq.; Clerk of District Court, D. J. Muri; Sheriff, R. J. Guy.

Officers of Yellowstone County (County Seat, Billings)—County Attorney, H. L. Wilson, Esq.; Clerk of District Court, *F. H. Foster; Sheriff, John C. Orrick.

*Hold-over. On appeal in the contest case of Carwile v. Jones, involving the office of Clerk of the District Court, the election held to have resulted in a tie vote. (38 Mont. 590.)

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SUPREME COURT RULES.

For Rules of the Supreme Court of the State of Montana, in force from and after January 4, 1909, see 37 Mont., page xxiii.

ERRATA.

Page 370, in line 1 of paragraph 8 of syllabus in *Johnson* v. *City of Great Falls et al.*, insert the words "of the Constitution" after words "Section 4, Article XII," so as to read: "Section 4, Article XII of the Constitution," etc.

Page 504, in line 3 of paragraph 1 of syllabus in *Wilson et al.* v. *Yegen Bros et al.*, insert the words "of the persons" after the word "names," so as to read: "In the names of the persons composing the partnership."

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

DECEMBER TERM, 1908.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. HENRY C. SMITH,
THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.

GEHLERT, RESPONDENT, *v.* QUINN, APPELLANT.

(No. 2,555.)

(Submitted November 24, 1908. Decided December 12, 1908.)

[98 Pac. 369.]

Conversion—District Judges—Bias and Prejudice—Disqualifying Affidavits—Sheriffs—Void Process—Effect—Briefs—Specifications of Error.

District Judges—Disqualifying Affidavits—Liberal Construction of Statute.

1. Section 6315, Revised Codes, providing for the disqualification of a district judge by the filing of an affidavit that the party making it has reason to believe, and does believe, that he cannot have a fair and impartial trial before such judge because of the latter's bias or prejudice, should be liberally construed with a view to effect its object and promote justice.

Conversion—District Judges—Who may File Affidavits of Disqualification.

2. *Held*, in an action in conversion against a sheriff, that the plaintiff at whose instance and request the sheriff under a writ of attachment levied upon the property in controversy and who had indemnified the officer, was the real party in interest in the action in conversion and could file an affidavit disqualifying the trial judge, although he had not intervened and was not a party to the record.

Appeal—Briefs—Specifications of Error.

3. Where an error relied upon for reversal was clearly set forth in appellant's brief in a paragraph by itself, it was sufficient, even though it was not set out in appellant's specifications of error.

Sheriffs—Attachment—Infirmity in Process—Effect.

4. Where a sheriff in levying upon property purported to act by virtue of a writ of attachment, infirmity in his process did not have the effect of changing his official status, i. e., he acted officially, notwithstanding such infirmity, and not individually.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by H. M. Gehlert against John J. Quinn. Judgment for plaintiff, and defendant appeals from it and an order denying him a new trial. Reversed and remanded.

Mr. John F. Davies, and *Messrs. McBride & McBride,* for Appellant.

Mr. Jas. E. Baldwin, and *Mr. J. R. Grice,* for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

The opinion of the court on a former appeal of this case is found in 35 Mont. 451, 119 Am. St. Rep. 864, 90 Pac. 168. The cause has been retried in the district court of Silver Bow county. Plaintiff had a verdict and judgment, and defendant appeals from that judgment, and also from an order denying a new trial.

On the twenty-eighth day of October, 1907, the day preceding the date set for the second trial, John M. Barber filed an affidavit in the cause, wherein he alleged as follows: "That he is the real party in interest as defendant in the above-entitled action; that the said John J. Quinn acted in the capacity of sheriff at the instigation and request of this affiant, and that this affiant is responsible to the said defendant for any judgment which may be rendered against him. That by reason of the premises he is the agent of the said defendant, attending to the defense and preparing for the defense of the above-entitled action. That the above-entitled action is now pending in the above-entitled court. That affiant has reason to believe, and does believe, that he cannot have a fair and impartial trial or hearing in the above-entitled court before the Honorable George M. Bourquin, judge presiding, * * * by reason of the bias and prejudice of the said judge, before whom said action is pending." The record recites

that the court made an order "ignoring the said affidavit," and directing that the trial proceed. To this action an exception was saved.

Section 6315, Revised Codes, provides that a judge must not sit or act in any action or proceeding when any party makes and files, at any time before the day fixed for the hearing or trial, an affidavit to the effect that he has reason to believe, and does believe, that he cannot have a fair and impartial hearing or trial before said judge by reason of the bias or prejudice of the judge. This Code provision establishes the law of the state respecting the subject of disqualification of a district judge, and should be liberally construed, with a view to effect its object and promote justice. (Revised Codes, secs. 4, 6214, 8061.)

The complaint alleges that the defendant Quinn was acting in the capacity of sheriff. The answer sets forth that he seized the property in controversy by virtue of a writ of attachment, in the case of *J. M. Barber* v. *J. A. Fay*. The reply avers that the writ of attachment was void, for the reason that it was issued before the summons in the case was issued—"the writ of attachment having been issued November 2d, and the only summons in the action having been issued on the following day, to-wit, November 3d." The complaint further alleges that on November 4th the plaintiff Gehlert made a third-party claim upon the sheriff for the property seized under the writ of attachment against Fay, and the sheriff refused to deliver the property over to him. Section 6673, Revised Codes, provides that when a third person claims the attached property, the sheriff shall deliver the same to him, unless the plaintiff, within ten days after receiving notice thereof, give the sheriff a good and sufficient bond to indemnify him against loss or damage by reason of retaining the property.

It is argued by the respondent that Barber should have intervened, in order to become a "party" within the meaning of section 6315, Revised Codes, but we cannot agree with this contention. The sheriff had no real interest in the property attached. The statute requires that the plaintiff file with the clerk, before

the writ is issued, an undertaking conditioned to indemnify the defendant in case the plaintiff fails to recover a judgment or the court should finally decide that he was not entitled to an attachment. (Revised Codes, sec. 6659.) And in case the sheriff, at the direction of the plaintiff, seizes property which is afterward claimed by a third person, he may demand an undertaking of indemnity as a condition of retaining possession. (Sec. 6673, *supra.*) It can make no difference to him what the relative rights of the parties are. The practice is, in the event the sheriff is sued in conversion for property attached and retained by him, to deliver the papers served on him to the plaintiff in the original case, or his attorney, and pay no further attention to the matter. Having furnished an obligation to hold the sheriff harmless from any judgment that may be recovered against him, self-protection impels the attaching creditor to interpose a defense to the action, if he has any, in which event it is usual for the sheriff perfunctorily to verify the answer.

Section 7191, Revised Codes, provides that, if an action be brought against a sheriff for an act done by virtue of his office, and he give written notice thereof to the sureties on any bond of indemnity received by him, the judgment recovered thereon shall be conclusive evidence of his right to recover against such sureties, and the court may, on motion upon notice of five days, order judgment to be entered up against them for the amount so recovered, including costs.

There was no way in which the alleged disqualification of the judge could affect Quinn personally. He was not interested in the result of the suit, but Barber was. Therefore, we have no hesitancy in holding that, as Barber was the person whose interests were being litigated, he was entitled to file the disqualifying affidavit. Undoubtedly, the learned district judge applied a strict construction to section 6315, Revised Codes, *supra;* but we think that section falls within the provisions of sections 4, 6214 and 8061, Revised Codes, *supra,* and that the construction we place upon it will best effect the object sought to be attained by its enactment.

Respondent contends that the action of the court in ignoring the affidavit is not specified in appellant's brief as an error relied upon, and cannot be reviewed; but we find the matter clearly set forth in the brief in a paragraph by itself, and regard this as a sufficient statement that it is relied upon.

Defendant objected to the introduction of any evidence by plaintiff, for the reason that the allegations of the reply, to the effect that the writ held by the sheriff was void, were a departure from, and inconsistent with, the allegation of the complaint that the defendant was acting as sheriff, and that the complaint, as modified by the reply, did not state facts sufficient to constitute a cause of action against Quinn individually. Also, at the conclusion of plaintiff's affirmative case, the defendant moved for a nonsuit on the ground, among others, that the testimony showed that the seizure was made by a deputy sheriff, and under the allegations of the reply it was incumbent upon the plaintiff to show that, if the writ was void, the sheriff made the seizure personally. The ground of these contentions is that, although Quinn assumed to act as sheriff, if his process was defective or void, he acted individually, and not officially. But we are of opinion that his status was not changed by the infirmity in his process, although it may thereby have been rendered void. He purported to act by virtue of it, and was none the less acting officially. (*City of Philipsburg* v. *Degenhart*, 30 Mont. 299, 76 Pac. 694.)

We have read the testimony offered by the plaintiff, and conclude that he made out a case sufficient to warrant the court in submitting the issue to the jury.

Other errors are assigned by the appellant, but we think the foregoing discussion disposes of all those questions that will probably arise on a retrial.

The judgment and order appealed from are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

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KAUFMAN, APPELLANT, v. COOPER ET AL., RESPONDENTS.

(No. 2,550.)

(Submitted October 10, 1908. Decided December 12, 1908.)

[98 Pac. 504.]

Claim and Delivery—Appeal—Dismissal—Undertaking—Sufficiency—Pleadings—Issues—Conflict in Evidence—Review.

Appeal—Judgment—Lapse of Time—Dismissal.

1. An appeal from a judgment not taken within one year from the date of its entry will be dismissed.

Same—Undertakings—Sufficiency.

2. An undertaking on appeal from a judgment and an order denying a new trial, in the form of that held sufficient in *Watkins* v. *Morris*, 14 Mont. 354 (to-wit, omitting the alternative condition referring to each), sustains both appeals if properly taken; hence it is sufficient to sustain the appeal from the order, where that from the judgment is dismissed because not taken in time.

Claim and Delivery—Pleadings—General Denial—Matters Admissible Under.

3. Since in claim and delivery, wherein plaintiff relies on general allegations of ownership and right of possession, a general denial puts in issue both the right of property and the right of possession, as well as all other material allegations of the complaint, and under it defendant may give in evidence any special matters which will defeat plaintiff's claim, the court did not err in permitting defendants, in an action wherein plaintiff sought to recover possession of a stock of merchandise theretofore delivered by him to another to be sold, with an option to purchase, and afterward by the latter placed in the hands of defendants under the same agreement, to abandon their special plea by which they claimed under a sale from their predecessor, and proceed under their general denial.

Appeal—Conflicting Evidence—Review—New Trial.

4. Where the finding of the jury is based on irreconcilably conflicting evidence, it and the judgment of the trial court in denying a motion for a new trial, upon a review of the evidence, will not be disturbed on appeal.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by Louis Kaufman against C. W. Cooper and another, copartners. From a judgment for defendants, and from an order denying a motion for a new trial, plaintiff appeals. Appeal from judgment dismissed, and order affirmed.

Messrs. Lamb & Walker, and *Mr. John J. McHatton*, for Appellant.

Messrs. Maury & Templeman, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action in claim and delivery. The complaint was filed on June 13, 1904. It is in the usual form, alleging that the plaintiff is the owner and entitled to the possession of a certain stock of goods, wares and merchandise, describing it, and of a certain promissory note for $455, all of said property being alleged to be of the value of $2,500, and that, though possession was demanded of defendants prior to the bringing of this action, it is wrongfully detained by them, to plaintiff's damage in the sum of $500.

The answer denies generally and specially all the allegations of the complaint, except that the defendants refused to deliver the possession to plaintiff. It then proceeds to allege, by way of special defense, as follows:

"(1) That at all times herein mentioned, H. J. Gielens, C. W. Cooper, Jr., and Louis Kaufman were transacting business in the county of Silver Bow, under the firm name and style of Louis Kaufman and Louis Kaufman & Co.

"(2) That the said H. J. Gielens, C. W. Cooper, Jr., and Louis Kaufman, as such copartnership, on or about the —— day of February, 1904, entered into a contract in writing with Sig. Gensberger, of Silver Bow county, Mont., whereby the said copartnership sold to the said Gensberger a stock of goods situated at No. 41 West Park street, in the city of Butte, Silver Bow county, Mont.

"(3) That thereafter, to-wit, on or about the sixteenth day of March, 1904, with the full knowledge and consent, and with the approval of the said copartnership, the said Sig. Gensberger transferred the said contract of purchase to these answering defendants, and that thereupon these answering defendants went into possession of the said stock of goods, and since the said date have largely increased the amount of goods at said stand, and have built up a large and profitable mercantile trade, and that all of the purchase price of the said stock of goods has

been paid, and was paid prior to the commencement of this action, excepting the sum of $2,500.

"(4) That the stock of goods at the said stand is worth the sum of $10,000, and the good will of the said business, and the trade built up and established by these answering defendants, is worth in excess of $10,000.

"(5) That the above-named Louis Kaufman, purporting to act for and on behalf of the said partnership, on or about the fourth day of June, 1904, and purporting to act in pursuance of the terms of the said written contract above referred to, served a notice upon these answering defendants to the effect that they should have twenty days from the date of said service, to-wit, up to and including the twenty-fourth day of June, 1904, within which to pay the balance due upon the purchase price of the said stock of goods, to-wit, the sum of $2,500.

"(6) That notwithstanding the said notice, and notwithstanding the terms of the said contract, and notwithstanding the fact of the largely increased value of the stock of goods situated at said stand, and the large and valuable trade established by these answering defendants at said place of business, and in violation of the said contract, the said Louis Kaufman, still purporting to act on behalf of the said partnership, on the thirteenth day of June, 1904, commenced this action, and ousted and ejected these answering defendants from the possession of their said business and property."

Other matters were also alleged, not material, however, to be considered on this appeal. The answer was filed on June 14. Subsequently, a supplemental answer was filed, in which it is alleged that since the filing of the original answer the sheriff, who had taken the goods from the possession of the defendants, had delivered them to plaintiff, except the promissory note mentioned, which the sheriff did not take, and that the defendants claim a return of all and every part thereof, or its value in case a return cannot be had, and damages.

The replication puts in issue the value of the stock; also the fact, alleged in the answer, that it had in any manner been in-

creased in value by additions made by the defendants. It also denies that the copartnership alleged in the answer had any interest in the property whatsoever, and alleges that the plaintiff was, and now is, the owner and entitled to the possession of the same. It admits that the plaintiff served the notice referred to in paragraph 5 of the defendants' affirmative defense, but denies that Louis Kaufman acted for or on behalf of the copartnership.

The jury found generally for the defendants; that the plaintiff had taken all the property from their possession at the time of commencing the action, except the promissory note, and that a return could not be had; that on June 13, 1904, the date at which it was taken, it was of the value of $5,000, and that the defendants were entitled to recover that amount, with interest from that date. Judgment was entered accordingly. Plaintiff appealed from the judgment and an order denying his motion for a new trial.

1. The defendants moved for a dismissal of the appeals and submitted the motion at the hearing on the merits. One of the grounds of the motion to dismiss the appeal from the judgment is that it was taken more than one year after the date of the entry of judgment. The judgment was entered on February 15, 1907. The notice of appeal was served and filed on February 28, 1908. The right of appeal from the judgment had been lost by lapse of time. (Revised Codes, sec. 7099.) This appeal is therefore dismissed. The ground of the motion, in so far as it is directed at the appeal from the order, is that plaintiff attempted to appeal both from the judgment and the order, and that the undertaking filed does not support the two appeals, or either of them, because it does not contain the necessary alternative condition referring to each. The form of it is the same as that held sufficient in *Watkins* v. *Morris,* 14 Mont. 354, 36 Pac. 452, and *Ramsey* v. *Burns,* 24 Mont. 234, 61 Pac. 129, and upon the authority of these cases the motion to dismiss the appeal from the order is denied. The undertaking is sufficient to sustain both appeals, if both had been properly taken. It is

therefore sufficient to sustain the latter, though the former must be dismissed because not taken in time.

2. The contention made by counsel in their brief on the merits questions the propriety of certain rulings of the court in admitting evidence and the sufficiency of the evidence to justify the verdict. The written contract referred to in the pleadings, having been identified for the plaintiff, was introduced in evidence, and is as follows:

"AGREEMENT.

"I, Louis Kaufman, hereby agree to sell to Sig. Gensberger, all of the stock of goods, merchandise, book accounts, bills receivable, fixtures, furniture, leases and contracts purchased by the said Louis Kaufman from the Palais Royal Company on the 16th day of February, 1904, and the bankrupt stock of S. M. Wilson, situated at No. 33 West Park street, Butte, Montana, for and in consideration of the sum of fifty seven hundred dollars, and interest thereon from the date of this agreement, until paid, at the rate of ten per cent per annum, to be paid to the said Louis Kaufman by the said Sig. Gensberger, in the following manner, to-wit: The sum of three hundred dollars to be paid upon the execution and delivery of this agreement, and the balance of said amount to be paid as hereinafter specified.

"I hereby agree to employ the said Sig. Gensberger to manage the business for me, at a salary of one hundred ($100) dollars per month, under my supervision, or the supervision of my agent to be hereafter designated for that purpose; that the said Sig. Gensberger shall deliver to me or my agent on each and every day, all moneys received by the sale of merchandise made on the said day, or the day before; when I have received out of the receipts for merchandise now on hand or from any source from said business, the sum of fifty-four hundred dollars, and interest as hereinabove provided, over and above all expenses, I agree to sell and convey the good will of the business, the merchandise, fixtures, furniture, leases, contracts, and book accounts belonging thereto, to the said Sig. Gensberger, and deliver the same to

him, it being understood and agreed that until such time as I shall be fully paid, I shall remain the owner of said business and merchandise, and the same shall be managed for me by the said Sig. Gensberger, without further cost or expense to me, except as hereinbefore stated, provided that if at any time I shall be dissatisfied with his management of said business, I shall have the right to terminate the same upon twenty days' notice in writing to him, and the said Sig. Gensberger shall not be entitled to a bill of sale or to any interest in said goods or business unless he shall within said twenty days pay me whatever balance there may be due me, time being the essence of this agreement. It is expressly agreed that in no event shall this option and contract be valid and binding for more than six months.

"The said Sig. Gensberger shall not as my manager or otherwise order or purchase any additional goods or merchandise without my knowledge or express consent, or the direction of my agent to be hereafter designated, and in case any such goods or merchandise are ordered with my consent, or that of my agent, or put in stock in said business, they must also be paid for in addition to my realizing the total sum of fifty-seven hundred dollars and interest, before I shall be under any obligation to transfer or sell the said business, goods, contracts or property to the said Sig. Gensberger.

"The drawing of this agreement as well as all legal advice, court costs, or costs of lawsuits, had or that may be had in connection with the said Palais Royal Company's business, and any advice that may be had in the future in reference thereto, or to this agreement, or the right of the parties hereto, shall be considered as a part of the business expense.

"All moneys paid out herein as expense must be for proper and reasonable purposes, such as insurance, rent, wages, advice and necessary expenses in conducting said business, and shall be reasonable in amount, and shall be paid by me or my agent, out of the proceeds of sales made in the said business. An account of such expenses shall be kept as well as an account of all merchandise purchased, and the sales thereof, and shall be open

to the inspection of both parties to this agreement, during the said period of six months.

"It is further agreed and understood that the said Sig. Gensberger shall not have the right to put in stock, or sell any goods belonging to himself, and that there shall be no goods sold in said business except such as were purchased from the said Palais Royal Company's sale, and said bankrupt stock of said S. M. Wilson, to said Louis Kaufman, and such as may be hereafter purchased with the consent of said Louis Kaufman or his agent, to be hereafter designated, unless special consent in writing be given therefor by me or my said agent.

"The said Sig. Gensberger shall not as agent or manager for the said Louis Kaufman, have any authority to incur any indebtedness or obligation without his consent, or the consent of his said agent, and shall immediately upon receipt of any moneys arising from the sale of goods or merchandise, or to become due on account of said business, deliver the same to him, or his said agent, and in consideration of the foregoing, the said Sig. Gensberger does agree to pay to said Louis Kaufman, the total sum of fifty-seven hundred dollars, and interest, above specified, and does hereby accept the provisions and conditions of the foregoing agreement.

"The said Sig. Gensberger does hereby agree to act as manager for the said Louis Kaufman under the provisions herein and to exercise his best endeavors to realize from the said sale of said goods and merchandise, for the said Louis Kaufman, the additional sum of fifty-four hundred dollars and interest as provided, over and above all expenses making a total of fifty-seven hundred dollars and interest. In witness whereof," etc.

Other evidence introduced on the part of plaintiff tended to show that at the date of the contract he was the sole owner of the stock of goods; that finding that Gensberger was not disposing of it as rapidly as he desired, he opened negotiations with the defendants with the purpose of inducing them to assume Gensberger's obligations under the contract, they to have the benefit of all the payments out of receipts of sales made by

him up to that time; that the result of these negotiations was that they agreed to assume Gensberger's place; that thereafter plaintiff obtained from Gensberger an assignment of the contract to himself, refunding to him the cash payment made by him; that no written assignment of the contract was made to the defendants, but that they from and after March 16, the time at which the arrangement with them was completed, took possession as plaintiff's agents, and proceeded under the contract, making sales and delivering the daily receipts to the brother of plaintiff, to be deposited to the credit of the latter; that this course was pursued from March 16 until June 7, when the defendants ceased to account for the receipts from sales; that thereafter, upon demand by plaintiff of such accounting, or, in lieu thereof, that the defendants relinquish the goods to him, he was ejected from the place of business by the defendants, and thereupon he began this action. On cross-examination he was required to answer, over his objection, as to payments made to him or his agent by Gensberger of receipts of daily sales, and as to the amount still due of the purchase price agreed to be paid for the goods. He was, over like objection, required to answer, also as to cash payments made to him by the defendants on March 17 and on April 21, amounting to $2,500, the purpose of the inquiry being to obtain an admission from him that, when the arrangement was made with the defendants, the Gensberger contract had been modified in one particular, to-wit, that in consideration of the payment of $3,000 in cash by the defendants, they were vested with title to the stock, and became debtors to the plaintiff for the balance of the purchase price. He stated that it had been agreed that they would add other goods to the stock, and that cash to the amount of $3,000 was necessary for that purpose; that the amount paid, he having subsequently consented to accept $2,500 instead of $3,000, was intended for that purpose alone, and had been expended by him in purchasing such other goods; that these were added to the stock under the provisions of the Gensberger contract, and that the contract had not been modified in any particular. The ground of the

objection to the inquiry touching the Gensberger payments was that the evidence was immaterial, because it was admitted in the answer that there was still due under the contract the sum of $2,500, and it was of no moment what payments Gensberger had made. The objection to the inquiry as to the cash payments made by the defendants was, that the evidence sought was not relevant to the issues made by the answer. In other words, since the defendants had pleaded the Gensberger contract, and admitted that full payment had not been made thereunder, they must stand upon its provisions.

The evidence on the part of the defendants tended to show that, at the time the arrangement was entered into by the parties, the Gensberger contract had been modified to the extent that title to the stock of goods passed to the defendants upon payment of $2,500; that they were not to receive any salaries for their services in selling the goods, and that they became simply debtors to the plaintiff for the balance due after being given credit for this sum, together with the deposits which had been made by Gensberger, the exact amount of which the record does not show. Objection was made to all of this evidence, the ground of objection being the same as that above stated.

During the course of the trial the defendants requested leave to amend their answer by eliminating from it all reference to the Gensberger contract. This request was denied, the court being of the opinion that the matter specially pleaded did not present a material issue, and that the defendants were not precluded by it from introducing evidence tending to show a modification of the contract by which they purchased outright.

The evidence touching payments made by Gensberger was not material or relevant to any issue in the case, yet we think it apparent that the plaintiff suffered no prejudice from the court's ruling. In reply to the inquiries made, plaintiff denied that any payments had been made other than the cash payment of $300, which had been returned. Elsewhere he was questioned as to the amounts deposited which were derived from daily sales,

but failed to give a definite answer, though he impliedly admitted that deposits to some amount had been made.

The principal contention of counsel in this court, based upon their objections to evidence, challenges generally the correctness of the theory upon which the court proceeded. We are of the opinion that the contention is without merit. In statutory actions, often called replevin, to recover the possession of personal property, wherein the plaintiff relies on general allegations of ownership and right to possession, a general denial puts in issue both the right of property and the right of possession, as well as all other material allegations in the complaint, and under it the defendant may give in evidence any special matters which will defeat the plaintiff's claim. (*Gallick* v. *Bordeaux*, 22 Mont. 470, 56 Pac. 961; Phillips on Code Pleading, sec. 492; Cobbey on Replevin, sec. 751.) He is permitted to controvert the plaintiff's evidence; to disprove his allegations; to prove other and inconsistent facts; to prove his own right to possession; to show title in a third party; or to show that he has seized the property as an officer, under process against one from whom the plaintiff obtained it in fraud of creditors. Such being the rule, the court was correct in permitting the defendants to abandon the so-called special defense and proceed under their general denial. In view of the denials, which amount to a general denial, it was not necessary to plead the special defense, and it might have been stricken from the answer without impairing its sufficiency. This was, in effect, what the court did when the ruling was made that the defendants were not precluded by it from introducing proof of their title and right to possession under the general denial.

3. It would serve no useful purpose to state in detail or analyze the evidence in order to demonstrate the conclusion that it is sufficient to sustain the verdict, both as to the ownership of the property and its value. It is in irreconcilable conflict on almost every point, so much so that, if it had been submitted to this court in the first instance, a finding upon it would have been attended with much difficulty. No complaint is made that it was not fairly submitted to the jury under the instructions

given by the court. It presented a question for the jury. Under the rule so often stated, this court is bound to accept the finding of the jury thereon, and the judgment of the district court on review of it on the motion for a new trial, even though it might not have agreed with either the court or jury in their finding thereon.

4. The defendants contend that a finding for the plaintiff could not have been sustained in any event, because the Gensberger contract, construed according to its obvious meaning, gave them the right to retain possession of the stock until the expiration of twenty days from the date of notice to them by the plaintiff that he elected to terminate it, this time being allowed them to make final payment of any balance of the purchase price due at the date of notice. This being so, it is said that this action was prematurely brought, and hence that, though the defendants ought to have been compelled to rely upon the contract as pleaded, their right to possession at the commencement of the action was perfect. Since the order must be affirmed for the reasons stated above, we deem it unnecessary to discuss this feature of the case.

The order is affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SMITH concur.

ON MOTION FOR REHEARING.

[98 Pac. 1135.]

Briefs—Assignments of Error—Failure to Argue—Rehearing.

1. Where counsel for appellant failed in their brief to argue assignments of error based upon the refusal of the court to give certain instructions, and merely stated therein that under the pleadings and facts in evidence they should have been given, thus leaving it to the supreme court to determine for itself from such examination wherein the trial court erred in refusing them, a petition for rehearing on the ground that in its decision the appellate court overlooked such assignments of error has no merit.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The petition for a rehearing of this cause states several grounds therefor—among others, that in the original opinion the court overlooked and failed to notice the several assignments of error upon the refusal of the trial court to submit certain instructions requested by plaintiff. In making this contention counsel overlook the condition of the brief submitted at the hearing. The assignments are properly made, but the argument in support of them amounts to no more than a suggestion that this court submit the instructions to examination and determine for itself wherein the court erred in refusing to give them. The argument, if it may be called argument, is, in substance, that under the pleadings and facts in evidence they should have been given. It was thus left to this court to find out for itself the particular error upon which counsel relied. If counsel deemed it not worth the trouble to make clear the error upon which they alleged prejudice, surely this court cannot be charged with oversight if it refused to make independent investigation to find it out. Nevertheless, from a reading of the instructions it is apparent that if any one of them had been given, and the jury had obeyed it, as it would have been bound to do, the verdict must have been for the plaintiff; for each one of them amounted to a direction to the jury to find for the plaintiff. In the original opinion we pointed out the fact that the evidence was conflicting as to what the agreement between the parties was. Under this condition it was the province of the jury to find the facts, and there was no error in the court's action in refusing to direct a verdict.

The greater portion of the argument in support of the petition is devoted to a review of the evidence in an effort to show that it is insufficient to sustain the verdict, and that this court was in error in its conclusion on this point. We do not find upon further consideration any reason to reach a different conclusion. The other points made were all made in the brief submitted at the hearing, and were given full consideration. We

find nothing in the petition to lead us to think that a rehearing would lead to a different result. The petition is denied.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE SMITH: I agree that the motion for a rehearing should be overruled.

GASSERT, RESPONDENT, v. STRONG ET AL., APPELLANTS.

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(No. 2,548.)

(Submitted October 12, 1908. Decided December 14, 1908.)

[98 Pac. 497.]

Equity—Fraud—Constructive Trusts—Actions Quasi in Rem—Nonresident Defendants—Summons—Service by Publication—Jurisdiction—Undertakings on Appeal—Mortgages—Evidence—Review.

Undertaking on Appeal—Sufficiency.

1. An undertaking on appeal, in an action in which the judgment was amended after entry, which recited that the appeal was from "the judgment and amended judgment" and an order denying a new trial, showed on its face that the appeal was from but one judgment, to-wit, the amended judgment, and the order. The original judgment had become *functus officio* by the amendment, and reference to it was surplusage; hence one undertaking was sufficient to support the appeals.

Same—Defect—How Cured.

2. An undertaking on appeal which is defective, but not void, may be cured by filing a new undertaking.

District Judges—Disqualification—Power to Call Other Judge.

3. Under the provisions of section 6315, Revised Codes, authorizing a district judge against whom a disqualifying affidavit has been filed to call in another judge to sit in the action, one of the judges of a district court, divided into departments, may call in a judge from another district without first calling upon one of the judges of his own court to preside.

Action *in Personam*—Definition.

4. A proceeding *in personam* is one, in form as well as in substance, between parties claiming the right, and the judgment binds the judgment debtor and those in privity with him, to some sort of personal liability; in the execution of the decree the debtor is an active factor.

Action *in Rem*—Definition.

5. A proceeding *in rem* is one to determine the state or condition of the thing itself, and the judgment binds all the world.

Action *Quasi in Rem*—Definition.

6. An action *quasi in rem* is one which, while brought against a person, seeks only to subject his property to the discharge of the claim asserted, and a judgment in such an action is only conclusive between the parties.

Same—Summons—Service by Publication—Jurisdiction.

7. An action against a nonresident holding the legal title to corporate stock, in the possession of a third person in the state, to establish and enforce a trust therein, is one *quasi in rem*, and service by publication was sufficient to enable the district court to determine the relative rights of the parties to the stock.

Constructive Trusts—Fraud—Complaint—Sufficiency.

8. A complaint in an action to have one of several defendants declared trustee *ex maleficio* for plaintiff's benefit, for an alleged conspiracy to defraud the latter out of his property, examined, and *held* to state a cause of action.

Same—Fraud—Transactions Between Parties—Burden of Proof—Presumptions.

9. Where, in an action to have one of several defendants declared trustee *ex maleficio* it appeared that plaintiff, who was indebted to defendants in a large amount, and had given them mortgages on his property to secure the debt, had relinquished his equity of redemption on valuable mining property to one of them while in a weak mental condition resulting from habitual intemperance, which was known to defendants and contributed to by one of them furnishing him with liquor, and while under a misapprehension as to the status of his accounts with defendants and in a state of ignorance of business generally and of the value of the property, a presumption arose against the *bona fides* of the transaction, and the burden was upon defendants to show that no unfair advantage was taken of plaintiff and that an adequate price was paid for the property.

Same—Mortgagors and Mortgagees—Transactions Between—How Viewed.

10. Where the relation of mortgagor and mortgagee has once been established, any subsequent arrangement by which the mortgagor's equity of redemption is sought to be transferred to the mortgagee will be viewed with distrust, and the original relationship of mortgagor and mortgagee held to exist unless it clearly appears that the transaction was perfectly fair and that no advantage was taken of the mortgagor by reason of his indebtedness.

Trustee and *Cestui Que Trust*—Transactions Between—Burden of Proof.

11. Where, in addition to mortgages to secure indebtedness, absolute deeds to the property were delivered as further security, the relationship of trustee and *cestui que trust* arose between the debtor and creditor, and the burden was cast upon defendant in an action assailing the *bona fides* of the transaction, to show that, when the *cestui que trust* relinquished his rights to defendant, the transaction was fair, that an adequate consideration was paid, that there was no fraud or concealment, and that the *cestui que trust* acted with full information relative to the status of the property. The presumption is against the transaction.

Equity—Appeal—Evidence—Findings—Review.

12. In equity cases it is incumbent upon appellant to show that the evidence preponderates against the findings of the trial court; if he is unable to do so, the supreme court will not interfere.

Appeal from District Court, Silver Bow County; J. M. Clements, Judge.

ACTION by Adam Gassert against Morgan Strong and others. From a judgment for plaintiff and an order denying them a new trial, defendants appeal. Affirmed.

Mr. John J. McHatton, Messrs. Gunn & Rasch, and *Messrs. Wight & Pew,* for Appellants.

The action under consideration is one *in personam.* (*Dearing* v. *Bank of Charleston,* 5 Ga. 497, 48 Am. Dec. 300; *Hinton* v. *Penn. Mutual Life Ins. Co.,* 126 N. C. 18, 78 Am. St. Rep. 636, 35 S. E. 182; *Pennoyer* v. *Neff,* 95 U. S. 714, 24 L. Ed. 565; 2 Black on Judgments, 2d ed., sec. 792 et seq.: *Hart* v. *Sansom,* 110 U. S. 151, 3 Sup. Ct. 586, 28 L. Ed. 101; *Cooper* v. *Reynolds,* 10 Wall. 308, 19 L. Ed. 931.) The fact that the corporation is a Montana corporation, and the certificates for the stock are within the jurisdiction of the court, is wholly immaterial in the absence of a statute providing for service by publication in such a case as this. (*Silver Camp Min. Co.* v. *Dickert,* 31 Mont. 448, 78 Pac. 967, 67 L. R. A. 940.) "The statutory provisions for acquiring jurisdiction over an absent or nonresident, by constructive service of summons, are in derogation of common law, and must be strictly construed and complied with in all substantial particulars under pain of nullity." (*Palmer* v. *McMasters,* 8 Mont. 186, 19 Pac. 585.)

On the proposition of L. M. Strong's good faith, we call attention to the following authorities: Wigmore on Evidence, sec. 581; *Kruse* v. *Seiffert etc. Lumber Co.,* 108 Iowa, 352, 79 N .W. 118; *Gardom* v. *Woodward,* 44 Kan. 758, 21 Am. St. Rep. 310, 25 Pac. 199; *Stevens* v. *Stevens,* 150 Mass. 557, 23 N. E. 378; *Watkins* v. *Wallace,* 19 Mich. 57; *Boddy* v. *Henry,* 113 Iowa, 462, 85 N. W. 771, 53 L. R. A. 769.

Mere drunkenness, or being a drunkard, or simply being drunk at the time, where the intoxication does not extend to that degree where it takes away the agreeing mind, will not impair

a contract. To have this effect, it must render the party *non compos mentis* for the occasion. (Bishop on Contracts, secs. 980, 981; *Taylor* v. *Purcell*, 60 Ark. 606, 31 S. W. 567; *Willcox* v. *Jackson*, 51 Iowa, 208, 1 N. W. 513; *Loftus* v. *Maloney*, 89 Va. 576, 16 S. E. 749; *Watson* v. *Doyle*, 130 Ill. 415, 22 N. E. 613; *Wright* v. *Waller*, 127 Ala. 557, 29 South. 57, 54 L. R. A. 440; *Woodson* v. *Gordon*, Peck (Tenn.), 196, 14 Am. Dec. 743; *Burroughs* v. *Richman*, 13 N. J. L. 233, 23 Am. Dec. 719; *Bates* v. *Ball*, 72 Ill. 108.)

Deceit or fraud must be clearly and directly established. (*Shaw* v. *Gilbert*, 111 Wis. 165, 189, 86 N. W. 188; *Miles* v. *Pike Min. Co.*, 124 Wis. 278, 102 N. W. 555; *Levy* v. *Scott* 115 Cal. 39, 46 Pac. 892; *Morris* v. *Talcott*, 96 N. Y. 100; *Davidson* v. *Crosby*, 49 Neb. 60, 68 N. W. 338; *Mosher* v. *Post*, 89 Wis. 602, 62 N. W. 516; *Hanscom* v. *Drullard*, 79 Cal. 234, 21 Pac. 736.) Fraud is never presumed. (*Butte Hardware Co.* v. *Knox*, 28 Mont. 111, 72 Pac. 301.) The burden of evidence as to the existence of fraud is upon the party alleging it. (16 Cyc. 1082; *Bly* v. *Grady*, 113 Mich. 176, 71 N. W. 521; *Ley* v. *Met. Life Ins. Co.*, 120 Iowa, 203, 94 N. W. 568; *Harrigan* v. *Gilchrist*, 121 Wis. 127, 99 N. W. 909; *City of Tacoma* v. *Tacoma Water Co.*, 16 Wash. 288, 47 Pac. 738; *Southern Development Co.* v. *Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678.) A person must stand by the words of his contract; and if he will not read what he signs, he alone is responsible for his omission. (*Upton* v. *Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; Smith on Frauds, sec. 244; *Slaughter* v. *Gerson*, 13 Wall. 379, 20 L. Ed. 627; *Taylor* v. *Fleckenstein*, 30 Fed. 99; *Hawkins* v. *Hawkins*, 50 Cal. 558; *Board of Commissioners* v. *Younger*, 29 Cal. 172.)

"No conveyance, absolute on its face, can be a mortgage unless made to secure the payment of a debt or performance of a duty." (*Morrison* v. *Jones*, 31 Mont. 154, 77 Pac. 507.) "Where a deed, absolute on its face, is claimed to be a mortgage, the burden is upon the party setting up such claim to establish the fact." (*Bryant* v. *Broadwell*, 140 Cal. 490, 74 Pac. 33.) A mortgagor may sell and dispose of the property subsequently

to the giving of a mortgage, subject to the mortgage, and may deal with it in all respects as if the mortgage had not been given. He may subsequently sell and dispose of it to the mortgagee, as well as to any other person. (*Fee* v. *Swingly*, 6 Mont. 596, 13 Pac. 375; *Green* v. *Butler*, 26 Cal. 595; *Watson* v. *Edwards*, 105 Cal. 70, 38 Pac. 527; *First Nat. Bank* v. *Bell S. & C. Co.*, 8 Mont. 32, 19 Pac. 403.)

In cases of this character the courts have recognized that there is a vast difference between different classes of property. The rules applicable to ranch or farming property, residence property, or the like, would not be at all equitable in the case of oil or mining property. The sudden and unforeseen changes in the value of this class of property is, of course, too well known to require comment. (*Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587, 23 L. Ed. 328; *Mantle* v. *Speculator Min. Co.*, 27 Mont. 473, 71 Pac. 665.) Where the mortgage does not convey the title, but merely creates a lien, as under the laws of this state, there is no relation of trust between the mortgagor and mortgagee, and the mortgagee has the same right to purchase the property that a stranger to the mortgage would have. (*Green* v. *Butler*, 26 Cal. 595; *Ten Eyck* v. *Craig*, 62 N. Y. 406; *Walker's Admr.* v. *Farmers' Bank* (Del.), 10 Atl. 95; *McDonald* v. *Donaldson*, 47 Fed. 765; *DeMartin* v. *Phelan*, 115 Cal. 538, 56 Am. St. Rep. 115, 47 Pac. 356.) Where the mortgagee purchases the equity of redemption, the same consideration which would support a purchase by a stranger will be sufficient. (*Peugh* v. *Davis*, 96 U. S. 337, 24 L. Ed. 775.)

In the absence of fraud or oppression, the deed in question here is not rendered void for mere inadequacy of consideration. The parties are shown by the evidence to have been capable of contracting and did contract; and this court will not set that contract aside and substitute its own. (*Finlen* v. *Heinze*, 28 Mont. 548, 73 Pac. 123; *Burns* v. *Smith*, 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742.) It is the policy of the law to discourage litigation; not to compel conflicting claimants to resort to the courts to settle their disputes (*Billau* v. *Kern* (Iowa),

107 N. W. 307; *Dickey* v. *Jackson*, 47 Or. 531, 84 Pac. 701); and the burden is upon the person attacking the settlement to prove that it was procured by fraud or duress. (*Billau* v. *Kern*, *supra*; *Galusha* v. *Sherman*, 105 Wis. 263, 81 N. W. 485, 47 L. R. A. 417.)

Messrs. Lamb & Walker, and *Messrs. Walsh & Nolan*, for Respondent.

This is not a case where two parties, occupying the attitude of perfect strangers, deal with each other, and one seeks to avoid his contract on account of his intoxication at the time it was entered into. It is a case of the mortgagee bargaining with the mortgagor for his equity of redemption. It is the case of a trustee claiming to have bought from the *cestui que trust* the trust property. For the rule applicable in such cases, see *Alexander* v. *Rodriguez*, 12 Wall. 323, 20 L. Ed. 406; *Peugh* v. *Davis*, 6 Otto, 332, 24 L. Ed. 819; 2 Jones on Mortgages, 340; 1 Bigelow on Fraud, 347; *Lynch* v. *Ryan*, 132 Wis. 271, 111 N. W. 707, 112 N. W. 427; *Moeller* v. *Moore*, 80 Wis. 434, 50 N. W. 396; *Bradbury* v. *Davenport*, 114 Cal. 593, 55 Am. St. Rep. 92, 46 Pac. 1062; *Wagg* v. *Herbert* (Okl.), 92 Pac. 250; *Oliver* v. *Cunningham*, 7 Fed. 689; *Marshall* v. *Thompson*, 39 Minn. 137, 39 N. W. 309; *Jones* v. *Frank*, 33 Kan. 497, 6 Pac. 789.) The burden is upon the grantee to show that the transaction was in every way fair, and the alleged purchase for a full and adequate consideration. This rule, readily deducible from the authorities above referred to, is declared in 1 Bigelow on Fraud, 347-349, and is expressly adjudicated in *McLeod* v. *Bullard*, 86 N. C. 210, and *Liskey* v. *Snyder*, 56 W. Va. 610, 49 S. E. 515. Though our law declares an absolute conveyance given as security a mortgage, the relationship of trustees and *cestui que trust* exists between the parties. The grantee in such a deed could convey good title to an innocent purchaser for value, and, on satisfaction of the mortgage, he could be compelled to reconvey to invest the mortgagor with the record title. (1

Jones on Mortgages, 339, 342b; 1 Perry on Trusts, 195; 28 Am. & Eng. Ency. of Law, 1020-1023.)

This is not an action for specific performance, but one to declare and enforce a trust; hence, *Silver Camp Min. Co.* v. *Dickert,* 31 Mont. 488, 78 Pac. 967, 67 L. R. A. 940, with reference to service of summons, has no application. The contention that the *situs* of the stock in question here was in New York, where the appellant L. M. Strong resided, and not in Montana, where was the domicile of the corporation under whose laws it was created, and within whose territory were the certificates, is contrary to the authorities. (*Young* v. *South Tredegar Iron Co.,* 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202; *Grayson* v. *Robertson,* 122 Ala. 330, 82 Am. St. Rep. 80, 25 South. 229; *Murphy* v. *Crouse,* 135 Cal. 14, 87 Am. St. Rep. 90, 66 Pac. 971; see, also, *Jellenik* v. *Huron C. M. Co.,* 177 U. S. 1, 20 Sup. Ct. 559, 44 L. Ed. 647; *Andrews* v. *Guayaquil etc. Ry. Co.,* 69 N. J. Eq. 211, 60 Atl. 568; *Jennings* v. *Rocky Bar Gold Min. Co.,* 29 Wash. 726, 70 Pac. 136.) That in an action to declare a trust, service of summons may be made by publication, see *Felch* v. *Hooper,* 119 Mass. 52; *Reeves* v. *Pierce,* 64 Kan. 502, 67 Pac. 1108; *Porter* v. *Baskin,* 43 Fed. 323.

In support of the proposition that the legislature may provide for service by publication in actions *quasi in rem,* see cases of *Clem* v. *Givens,* 106 Va. 145, 55 S. E. 567, and *Sohege* v. *Singer* (N. J.), 68 Atl. 64, both holding squarely that service by publication may be made in an action for specific performance when the property is within the state and the defendant beyond the jurisdiction, and *Andrews* v. *Guayaquil & O. Ry. Co., supra.*

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was commenced in the district court of Silver Bow county by Adam Gassert against Morgan Strong, Maud Bond Strong, L. M. Strong, and the Berlin Mining and Development

Company, the First National Bank of Butte, W. D. Thornton, and the North Butte Mining Company.

The third amended complaint, upon which the case went to trial, alleges, in effect, that Gassert is the owner of an undivided one-fourth interest in certain mining claims situated in Silver Bow county, which mining claims are designated as the Berlin group of mines, and hereinafter referred to as the Butte property; that from 1901 to 1905 the plaintiff had borrowed from the Strongs large sums of money, and, as security for such loans, had executed and delivered to them certain mortgages, and a deed dated January 6, 1904, covering plaintiff's interest in the Butte property and other property situated in Park county; that thereafter a settlement was had between plaintiff and the Strongs, by the terms of which $9,000 was agreed upon as the total amount of Gassert's liabilities to the Strongs, and to secure such indebtedness a mortgage was given to L. M. Strong upon plaintiff's Park county property, then standing in the name of Charles Gassert; that defendants Morgan, Maud Bond, and L. M. Strong entered into a conspiracy to defraud the plaintiff out of his interest in the Butte property, and, as one step in such conspiracy, procured the plaintiff to execute the deed of January 6, 1904, which, though absolute on its face, was in fact a deed in trust to secure moneys advanced and to be advanced to the plaintiff by the Strongs; that by mesne conveyances the mortgages had been assigned to L. M. Strong, and the legal title to plaintiff's Butte property had become vested in L. M. Strong; that defendant, L. M. Strong, in 1905 owned a one-fourth interest in the Butte property in his own right; that an agreement had been entered into by L. M. Strong with one S. A. Hall to convey to Hall the one-fourth interest which L. M. Strong held in his own right, and also the one-fourth interest claimed by the plaintiff; that Hall was to organize a corporation to be known as the Berlin Mining and Development Company, and that, as a consideration for the transfer of the Butte property, L. M. Strong was to receive one-half the capital stock of the corporation; that Hall assigned his interest in the contract to

the defendant Thornton, who organized the corporation, and that L. M. Strong thereafter entered into an agreement to sell to Thornton the shares of stock in the company which he was to receive, for $150,000, of which amount $50,000 has been paid; that such shares of stock had been placed in escrow with the First National Bank of Butte and A. J. Davis, its president, to be held pending the final payments of the purchase price; that Thornton had entered into some agreement with the North Butte Mining Company to sell to it the shares of stock so to be procured from L. M. Strong, but that no part of the purchase price had been paid.

It is further alleged, in effect, that the Strongs claim to hold a further release or conveyance of plaintiff's interest in the Butte property, but that, if such release or conveyance exists, it was obtained without any consideration, and that the consideration claimed by the Strongs to have been paid for such interest is grossly inadequate, and that such release or conveyance, if obtained, was obtained by fraud on the part of the Strongs; that at the time of procuring such release or conveyance, if any, the Strongs knew the value of plaintiff's interest, which, it is alleged, was $100,000, but fraudulently concealed the fact from the plaintiff for the purpose of acquiring his interest; that at and prior to such time plaintiff was addicted to the use of intoxicating liquors to such excess that he was incompetent to transact business, which fact was known to the Strongs, and that he was encouraged in his drinking habits by L. M. Strong and Morgan Strong, with the fraudulent purpose of procuring such release or conveyance; and that, if such release or conveyance was in fact ever made by plaintiff, he did not understand or appreciate the nature of the transaction. The prayer is that plaintiff be decreed to be the owner of one-half of the shares of stock for which L. M. Strong transferred the Butte property, and that such shares be impounded in the hands of the First National Bank and A. J. Davis, pending a final determination of this case.

The foregoing briefly paraphrases the amended complaint, and omits many allegations which are not deemed of consequence in the consideration of these appeals.

The defendant, L. M. Strong, first challenged the jurisdiction of the court, and, having taken an exception to the ruling of the court denying his contention, answered, as did the other defendants. After the trial had been in progress for some time the plaintiff filed a supplemental complaint, in which he alleged that the $9,000 mortgage given to L. M. Strong had been foreclosed, the Park county property sold under the decree, and the indebtedness due to L. M. Strong fully paid and discharged. It was developed at the trial that in 1902 Gassert had given to Maud Bond Strong one deed purporting to convey one-half of his interest in his Butte property, and another deed purporting to convey his remaining interest; and that soon thereafter Maud Bond Strong purported to convey by deed to L. M. Strong the same property. It was also developed at the trial that the capital stock of the Berlin Mining and Development Company was $200,000, represented by 20,000 shares of stock of the par value of $10 each. It was the contention of the plaintiff upon the trial that the note for $9,000, executed in 1905 and secured by mortgage upon the Park county property, evidenced all his indebtedness to the Strongs for moneys advanced and liabilities of his assumed by them. These appellants, on the contrary, controvert that theory, and claim that Gassert's indebtedness to the Strongs and his liabilities assumed by them amounted to approximately $14,400, and that by the settlement of June 17, 1905, Gassert received $5,400 for his Butte property.

The court made findings of fact and drew conclusions of law in favor of the plaintiff, to the effect that he is the owner and entitled to the possession of 7,500 shares of the stock in dispute, of a par value of $10 each, and a decree was entered in accordance with these findings and conclusions on July 19, 1907. On January 13, 1908, the findings of fact, conclusions of law and decree were amended, so as to read that plaintiff is the owner of 5,000 shares of stock, instead of 7,500 shares; and afterward

a motion for a new trial was made by the defendants Strong and overruled. Whereupon said defendants served and filed a notice of appeal, wherein they state that they appeal from the judgment of July 19, 1907, the judgment as amended, and the order denying a new trial. To perfect these appeals an undertaking in the sum of $300 was filed, wherein it is recited that the defendants appeal from "the judgment and amended judgment * * * and the order denying their motion for a new trial."

Respondent has moved to dismiss the appeals, for the reason that the same are taken from two judgments and an order denying a new trial, and but one undertaking is given. The motion to dismiss is denied. In the case of *Watkins* v. *Morris,* 14 Mont. 354, 36 Pac. 452, this court held that but one cost bond is required in appealing from a judgment and an order denying a new trial, where such appeal is consolidated into one record. The case of *Wadleigh* v. *Phelps,* 147 Cal. 135, 81 Pac. 418, cited by the appellants, is in point. In that case there was a motion to dismiss eleven separate appeals, or attempted appeals, from the judgment, verdict and various orders entered in the cause. The court said: "Respondent contends that the first six appeals should be dismissed because they are from nonappealable orders. This is true, but an order dismissing these appeals would be a vain act, for the simple reason that each and every of the enumerated orders is reviewable on the appeal from the judgment, and if that appeal stands the case would be in exactly the same condition after such order as it is now—the orders would still be reviewable. And this, in our opinion, is a fact which determines the true construction of the notice. It is, in substance and effect, a notice of appeal from a judgment, and nothing more. The special enumeration of the various orders reviewable on that appeal is mere surplusage, and ought to be so treated, for nothing can possibly come under review on the hearing which would not have been equally subject to review if such enumeration had been altogether omitted."

But it is urged by counsel for the respondent, on the authority of *Creek* v. *Bozeman Waterworks Co.*, 22 Mont. 327, 56 Pac. 362, that the court cannot look into the record to ascertain the nature of the order or judgment appealed from, because, where the ground urged for dismissal is that the appeal has never been properly perfected, the record is not before the court. But we do not find it necessary to examine the record in this case in order to arrive at the conclusion that there is but one judgment appealed from. Neither is it necessary to determine how many judgments there may be in one case. The undertaking recites that "the defendants are appealing from the judgment and amended judgment" of the court. There is no question of two judgments. It is the judgment as amended that is appealed from, and that fact appears on the face of the undertaking. The reference to this judgment before amendment is surplusage, and will be so regarded. The amended judgment took the place of the original, which became *functus officio* when the amendment was made. Having determined, then, that the undertaking we have been considering was not a nullity, it follows that the other defects therein pointed out by the respondent could be cured by filing a new undertaking (*Woodman* v. *Calkins*, 12 Mont. 456, 31 Pac. 63), which has been done.

For the convenient dispatch of business in the district court of Silver Bow county, the court is divided into three departments. This cause originally fell into department No. 1, presided over by Judge J. J. Lynch; Judge Lynch transferred it to department No. 3, presided over by Judge Donlan; the latter was disqualified by the defendants, and on motion of the plaintiff he requested Judge Clements, of the first judicial district, to try the case; defendants objected to going to trial before Judge Clements, and urged as a ground of objection that either Judge Lynch or Judge Bourquin, the other judges of the second judicial district, should first be requested to preside. The court overruled this objection, and this action is assigned as error. The comments upon this assignment of error found in appellants' brief are more in the nature of suggestions than arguments.

No reason is urged why the action of Judge Donlan in calling in Judge Clements was not proper, and in view of section 6315, Revised Codes, expressly reserving to a disqualified district judge the power to transfer the action or proceeding to some other court, or to call in another district judge to sit and act in such action or proceeding, we know of none.

The defendant, L. M. Strong, is a resident of the state of New York, and service of summons was made upon him by publication pursuant to the provisions of section 637 of the Code of Civil Procedure of 1895 (Revised Codes, sec. 6520), as in force prior to the amendment of 1907. It is insisted by appellants that such service was ineffectual, and *Silver Camp Mining Co.* v. *Dickert*, 31 Mont. 488, 78 Pac. 967, 67 L. R. A. 940, is cited in support of this contention. In the *Silver Camp Case* this court held that a suit to enforce the specific performance of a contract to convey real estate is a proceeding *in personam*, notwithstanding the fact that the land, the subject of the controversy, was located within this state and within the jurisdiction of the court; and we think it will not be questioned now that service by publication will not warrant a judgment in a proceeding strictly *in personam*, and that for the very obvious reason that the process of a court of this state does not have any validity beyond the borders of the state. On the other hand, every state has jurisdiction over property situated within its limits, even though owned by a nonresident; and in proceedings against such *property* jurisdiction to render a valid judgment *in rem* may be acquired by substituted service. (19 Ency. of Pl. & Pr. 612.) We have, then, but a single inquiry to answer: Is this proceeding now before us one *in personam*? If it is, the substituted service upon L. M. Strong was ineffectual for any purpose.

It was early sought to classify all judicial proceedings and all judgments as *in personam* or *in rem;* but the courts and text-writers have encountered extreme difficulty in attempting to formulate satisfactory definitions of these terms. A proceeding *in personam* is one, in form as well as in substance, between the

parties claiming the right, and that it is so *inter partes* appears from the record itself. (2 Smith's Lead. Cas. 692; *Hine* v. *Hussey*, 45 Ala. 496.) The judgment in such a proceeding binds the judgment debtor to some sort of personal liability. As was early said by the supreme court of Massachusetts, such a judgment debtor "is not a passive party, but must be eminently active in the performance of any decree which may be made against him." (*Spurr* v. *Scoville*, 3 Cush. (Mass.) 578.) After all, these are tests rather than definitions. A leading definition of a judgment *in rem* is that given by Hall, J., in *Woodruff* v. *Taylor*, 20 Vt. 65: "A judgment *in rem* I understand to be an adjudication pronounced upon the status of some particular subject matter by a tribunal having competent authority for that purpose. * * * A judgment *in rem* is founded on a proceeding instituted, not against the person as such, but against or upon the thing or subject matter itself, whose state or condition is to be determined. It is a proceeding to determine the state or condition of the thing itself; and the judgment is a solemn declaration upon the status of the thing, and it *ipso facto* renders it what it declares it to be." This definition, however, is criticised as being too narrow in 2 Black on Judgments, section 792. Of course, the judgment *in personam* binds only the parties and those in privity with them, while the judgment *in rem* binds all the world. (2 Black on Judgments, sec. 795.) But it was early discovered that the cases would not all fall within either or both of these two classes, and a fairly successful attempt to dispel the confusion was made by adding a third class, designated proceedings *quasi in rem*. Respecting this class, the supreme court of the United States, in *Freeman* v. *Alderson*, 119 U. S. 187, 7 Sup. Ct. 166, 30 L. Ed. 372, said: "There is, however, a large class of cases which are not strictly actions *in rem*, but are frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are actions in which property of nonresidents is attached and held for the discharge of debts due by them to citizens of the state,

and actions for the enforcement of mortgages and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff, are in a general way thus designated. But they differ, among other things, from actions which are strictly *in rem*, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties."

There does not appear to be any serious controversy over the character of the action now under consideration. The dispute arises over the class into which it falls. The plaintiff, Adam Gassert, contends that of the 10,000 shares of the capital stock of the Berlin Mining and Development Company, conveyed to L. M. Strong by that company, the legal title to some of which is in L. M. Strong himself, the remainder standing in the name of A. J. Davis, trustee, he (Gassert) is the equitable owner of 5,000 shares, and as to such 5,000 shares L. M. Strong is a trustee *ex maleficio* for the plaintiff's benefit. The shares are alleged to be in the possession of Davis in Butte, and the purpose of the action is to establish and enforce the trust; that is, to secure a decree confirming the title in Gassert to the 5,000 shares, holding L. M. Strong and Davis as involuntary trustees thereof for the use and benefit of Gassert, and directing the transfer of the stock on the books of the company. While this action is brought against L. M. Strong personally, it does not seek to subject him to any personal liability, but its sole object is to subject the shares of stock, which are within the jurisdiction of the court, to the claim of plaintiff. In the execution of the decree which was rendered, L. M. Strong is not an active factor at all. Davis is directed to surrender up the 5,000 shares, and the Berlin Mining and Development Company is directed to make the proper transfer on the books of the company.

In *Boswell's Lessee* v. *Otis*, 9 How. (U. S.) 348, 13 L. Ed. 164. it is said: "Jurisdiction is acquired in one of two modes: First, as against the person of the defendant, by the service of process; or, secondly, by a procedure against the property of the defend-

ant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery." (*Jennings* v. *Rocky Bar Gold Min. Co.*, 29 Wash. 726, 70 Pac. 136.)

In *Heidritter* v. *Elizabeth Oil-Cloth Co.*, 112 U. S. 294, 5 Sup. Ct. 135, 28 L. Ed. 729, the court, in adding to what had theretofore been said upon the subject of jurisdiction, held that jurisdiction may be acquired by the mere bringing of the suit in which a claim is sought to be enforced against property situated within its territorial jurisdiction. In speaking of the method of drawing the property actually within the jurisdiction of the court, it is said: "This, as we have seen, is ordinarily done by actual seizure, but may be done by the mere bringing of the suit in which the claim is sought to be enforced, which may by law be equivalent to a seizure, being the open and public exercise of dominion over it for the purpose of the suit."

In *Galpin* v. *Page*, 3 Saw. 93, Fed. Cas. No. 5206, Mr. Justice Field said: "Suits *in rem* may be divided into four classes: First, those which are directed primarily against particular property, and are intended to dispose of it without reference to the title of individual claimants; second, those which are instituted to determine the status of particular property or persons; third, those which are, in form, personal suits, but which seek to subject property brought by existing lien or by attachment, or some collateral proceeding, under the control of the court, so as to give effect to the rights of the parties; and, fourth, those which seek to dispose of property, or relate to some interest therein, but which touch the property or interest only through the judgment recovered. * * * The third and fourth classes mentioned are not strictly proceedings *in rem*, but so far as they affect property in the state, they are treated as substantially such proceedings."

Finally in *Pennoyer* v. *Neff*, 95 U. S. 727, 24 L. Ed. 565, the court said: "Substituted service by publication, or in any other

authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. * * * In other words, such service may answer in all actions which are substantially *in rem.*"

It has been quite generally held that an action to establish and enforce a trust in real estate is a proceeding *quasi in rem* (*Porter Land & Water Co.* v. *Baskin* (C. C.), 43 Fed. 323; *Reeves* v. *Pierce,* 64 Kan. 502, 67 Pac. 1108), and that "the courts of the state where the trust property is situate have jurisdiction over the enforcement and administration of the trust, so far as the property within their jurisdiction is concerned." (22 Ency. of Pl. & Pr. 21.) And, again, it is said that a court having jurisdiction of a trust estate does not lose it by reason of the trustee's absence from the state. (*Pennington* v. *Smith* (C. C.), 69 Fed. 188.)

The supreme court of California, in *Loaiza* v. *Superior Court,* 85 Cal. 11, 20 Am. St. Rep. 197, 24 Pac. 707, 9 L. R. A. 376, remarked: "If the state court has such power with reference to title to real estate held by a nonresident, how much the more will it have the same with reference to personal property situate within its jurisdiction. And the real and primary purpose of the action here under review is to determine the title and right to possession of the moneys and securities now within the jurisdiction of the court, secured from the plaintiffs in the action by fraud, under a contract which they were by law authorized to rescind and did rescind upon discovery of the fraud. Our statute says that in such a case the person who gains a thing by fraud is an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it. (Civ. Code, sec. 2224.) This being so, it cannot be that the arm of equity is so short, or so weak, that the fraudulent trustee—he who has become trustee by fraud—by remaining beyond the jurisdiction of the court, can prevent the court from seizing upon the subject of the trust within its jurisdiction, and restoring it to the defrauded *cestui que trust.*"

From the facts stated in the complaint in this action, it appears that these 5,000 shares of stock are charged with a trust, and it cannot be urged that our courts are powerless to enforce such trust, merely because one of the parties holding the legal title thereto is beyond the reach of the process of such courts. We think it sufficient to give the courts jurisdiction, that either the party or the subject matter of the trust is within the reach of the court. And this appears to be the holding of the courts. (*Felch* v. *Hooper*, 119 Mass. 52.)

To what class of actions, then, did section 637 above, before the amendment of 1907, apply? In the language of the supreme court, in *Roller* v. *Holly*, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520, we think "it applies to all cases where, under recognized principles of law, suit may be instituted against nonresident defendants." That it was so intended we think is obvious from the general terms in which the section is couched; and, so far as we know, the only exception which can be made from the operation of its provisions is in actions *in personam*, strictly speaking. We are of the opinion that the present action is not such a one, but that it falls within the definition of a proceeding *quasi in rem*, and that substituted service upon L. M. Strong was sufficient to enable the district court to determine the relative rights of the parties to the stock in question, even though it would not be sufficient to warrant a personal judgment against L. M. Strong himself.

The record in this case covers 1630 pages of closely printed matter. We have carefully read it all. It is impossible within any reasonable compass to make even a synopsis of the testimony, and the recital of the substance of the evidence given would not serve any useful purpose. We are satisfied from the record that the defendants Morgan Strong, Maud Bond Strong, and L. M. Strong deliberately entered into a conspiracy fraudulently to obtain from the plaintiff, Adam Gassert, title to his interest in the Butte property, and that such conspiracy was successfully carried out. We think the complaint states a cause of ac-

tion, and that Morgan Strong and Maud Bond Strong were properly made parties defendant.

The transactions between Gassert and the Strongs covered a period of about four years, during which time Gassert was indebted to the Strongs in large sums of money advanced to him, and for which the Strongs had security upon Gassert's property in Park and Silver Bow counties, including the Butte property above mentioned. During most of this time Gassert was in dire financial straits, and was addicted to drink to such an extent that he was incapacitated to a very great degree from transacting business. He was constantly harassed by Morgan Strong, who was the principal acting factor, by Strong's refusal to give him a statement of their account, and by giving to him conflicting and meaningless statements. We are inclined to believe that the evidence is sufficient to justify the finding of the trial court that the indebtedness of $9,000, evidenced by the mortgage given by Adam Gassert's brother Charles to L. M. Strong soon after the settlement of June 17, 1905, and provision for which was made in that settlement, included all the indebtedness due from Adam Gassert to the Strongs, and included, also, the $700 cash paid to Gassert at the time of such settlement; that when the Charles Gassert mortgage was foreclosed by Strong, and the Park county property was sold and the indebtedness evidenced by it fully paid, Adam Gassert's obligations to the Strongs were fully discharged; that, accepting the statement of the witness Ira T. Wight as to what transpired on June 17, 1905, when the settlement was made, as correct, which we do, Gassert's transfer or release of his Butte property to L. M. Strong was nevertheless without consideration to him, and that his consent to the settlement was the result of (1) his weakened mental condition resulting from his habitual intemperance, which condition was not only known to the Strongs, but was contributed to by L. M. and Morgan Strong by their furnishing liquor to Gassert, and evidently with the design to secure an unfair advantage over him, (2) his misapprehension as to the status of his account with the Strongs at the

time of the settlement, (3) his ignorance of business generally, and (4) his ignorance of the value of the Butte property, which value was known to the Strongs and concealed from Gassert. But, furthermore, this Butte property had been covered by mortgages given by Gassert to Maud Bond Strong, which mortgages had been assigned to L. M. Strong; so that on June 17, 1905, when it came to make the settlement, L. M. Strong sustained as to Gassert the relation of mortgagor to mortgagee. With this conclusion before us, it is only necessary to refer to the rules of law applicable to such transactions as further justification for the decision of the trial court.

While there is some division of opinion among the courts, we think the weight of authority and the better rule is that, when once the relation of mortgagor and mortgagee is established, any subsequent arrangement by which the mortgagor's equity of redemption is sought to be transferred to the mortgagee will be viewed with distrust, and their original relationship of mortgagor and mortgagee will be held to exist notwithstanding the arrangement, unless it clearly appears that such arrangement was perfectly fair to the debtor and that no advantage was taken of him by reason of his indebtedness. Upon this subject the language of the supreme court of Wisconsin is particularly pertinent. It is said: "Where the relation of mortgagor and mortgagee of real estate has been once established between two parties, and it is claimed that by a subsequent deed of the premises by the mortgagor to the mortgagee the equity of redemption has been extinguished and the mortgagee has become the absolute owner of the premises, it must be clearly shown that the conveyance or release was voluntary on the part of the mortgagor, was based on an adequate consideration, was untainted by fraud, and that no advantage was taken of the debtor's necessities to drive a hard bargain. Such transactions will be closely scrutinized, and, if the proof be clear and satisfactory that the requirements above named have been observed, the transaction will be sustained, otherwise not. In doubtful cases, the courts

incline to hold that the mortgage relation still exists." (*Lynch* v. *Ryan,* 132 Wis. 271, 111 N. W. 707.)

The case of *Villa* v. *Rodriguez,* 12 Wall. 323, 20 L. Ed. 406, though not exactly parallel with the one at bar in the facts, still furnishes a very terse pronouncement of the rule applicable to transactions such as the one in question here. It is there said: "The law upon the subject of the right to redeem, where the mortgagor has conveyed to the mortgagee the equity of redemption, is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale of a *cestui que trust* to his trustee is drawn in question. To give validity to such a sale by a mortgagor, it must be shown that the conduct of the mortgagee was in all things fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence. If there is vice in the transaction, the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved require that such should be the law." To the same effect is the text in 1 Bigelow on Frauds, 347. In other words, when Gassert had shown that the relationship of mortgagor and mortgagee existed between him and L. M. Strong at the time they approached the settlement of June 17th, when the contention is made that he transferred or relinquished to L. M. Strong his equity of redemption in his Butte property, a presumption at once arose against the *bona fides* of that transaction, and the burden was cast upon Strong to show that he paid Gassert what

the property was worth and took no unfair advantage of his superior position to obtain such conveyance or release.

In addition to the mortgages which Gassert had given to the Strongs, he had also executed and delivered to them certain deeds, absolute on their face, which purported to convey this Butte property to them. But we are satisfied from this record that such deeds were deeds of trust only, and were merely intended as further security for advances made by the Strongs. Under such circumstances, another relationship was created giving to the defendant L. M. Strong even a more commanding position than that of mortgagee, since, being invested with the legal title under deeds absolute on their face, he could convey it. This gave rise to the relationship of trustee and *cestui que trust,* and the rule of law applicable to transactions between such parties is even more stringent, if possible, than that applicable to transactions between mortgagor and mortgagee. It is very well expressed in the following language: "The trustee is in such a position of confidence and influence over the *cestui que trust* that the contract or bargain will either be void or he will be a constructive trustee, at the election of the *cestui que trust,* unless the trustee can show that the contract was entirely fair and advantageous to the *cestui que trust.* The presumption is against the transaction. * * * The general rule is that the trustee shall not take beneficially by gift or purchase from the *cestui que trust,* even although the supposed trustee and purchaser is a mere intermeddler and not a regularly recognized trustee. The question is not whether or not there is fraud in fact; the law stamps the purchase by the trustee as fraudulent *per se,* to remove all temptation to collusion and prevent the necessity of intricate inquiries in which evil would often escape detection, and the cost of which would be great. The law looks only to the facts of the relation and the purchase. * * * But there are exceptions to the rule, and a trustee may buy from the *cestui que trust,* provided there is a distinct and clear contract, ascertained after a jealous and scrupulous examination of all the circumstances, that the *cestui que trust* intended the trus-

tee to buy, and there is a fair consideration and no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee. The trustee must clear the transaction of every shadow of suspicion, and if he is an attorney, he must show that he gave his client, who sold to him, full information and disinterested advice. Lord Eldon said that he admitted that the exception was a difficult case to make out. And it may be said generally that it is difficult to find a case where such a transaction has been sustained. Any withholding of information, or ignorance of the facts or of his rights on the part of the *cestui*, or any inadequacy of price, will make such purchaser a constructive trustee." (Perry on Trusts, sec. 195; 1 Bigelow on Frauds, sec. 315.)

Of like tenor is the language employed by the American and English Encyclopedia of Law, where the authorities are collected. It is said: "Where a clear contract for the purchase of the trust property or a portion thereof by the trustee has been entered into between the trustee and the *cestui que trust*, the latter being *sui juris* and under no disability, by the operation of which the trustee has divested himself of his fiduciary relationship, the court will generally enforce the contract. But the court will subject the transaction to a jealous and searching investigation, and the contract will be set aside if they find any inequality in the bargain, or that to enforce it would be unconscionable, or should there appear to be inadequacy of price, or any concealment on the part of the trustee of information relative to estates, or fraud, or that the parties were not dealing at arm's-length, as they should upon termination of the relationship, but the trustee still retained influence over the *cestui que trust*." (28 Am. & Eng. Ency. of Law, 1020.) And in this instance, again, when it appeared that L. M. Strong sustained the relationship of trustee as to Gassert, the burden was thereupon cast upon him to establish all the requirements necessary to the validity of his title to the trust property, which he claims to have acquired by the settlement of June 17th. (28 Am. & Eng. Ency. of Law, 1023.)

It is manifest to us from this record that neither L. M. nor Morgan Strong was dealing with Gassert in an honest and frank manner, but were fraudulently designing to secure his Butte property; that they took advantage of his necessities and of his weakened mental condition to drive a hard and unconscionable bargain; that they withheld from him facts as to the true value of the property; and, if by any system of computation it could be said that there was in fact any consideration whatever for the transfer or relinquishment by Gassert of his interest in the Butte property to the Strongs on June 17th, it was so grossly inadequate that a court of equity could not hesitate to hold it for naught. Under the rule prevailing in this state, it is incumbent upon the appellants to show that the evidence preponderates against the findings of the trial court, in order for this court to disturb such findings. (*Finlen* v. *Heinze*, 32 Mont. 354, 80 Pac. 918; *Bordeaux* v. *Bordeaux*, 32 Mont. 159, 80 Pac. 6; *Delmoe* v. *Long*, 35 Mont. 139, 88 Pac. 778.) In this we think the appellants have failed. On the contrary, there seems to be sufficient evidence to justify the trial court's findings.

We have examined all the specifications of error, but in our opinion the case was fairly tried and the correct conclusion reached.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

Rehearing denied January 18, 1909.

Appeal taken to the supreme court of the United States, March 26, 1909.

STATE, RESPONDENT, v. CONWAY, APPELLANT.

(No. 2,556.)

(Submitted November 24, 1908. Decided December 17, 1908.)

[98 Pac. 654.]

Criminal Law—Intoxicating Liquors—Selling to Females—Information—Sufficiency—Evidence—Review.

Criminal Law—Intoxicating Liquors—Selling to Females—Information—Sufficiency.

1. An information charging defendant with having permitted a female to be or remain in his saloon for the purpose of being there supplied with liquor,—contrary to the provisions of section 8385, Revised Codes,—which alleged that defendant was "then and there" the owner and manager having charge and control, was sufficient to apprise him that he was accused of being in control "for the time being" (the words used in the statute), and therefore sufficient under section 9155, Revised Codes, providing that words used in a statute to define a public offense need not be strictly pursued in the information, but words conveying the same meaning may be used.

Same—Evidence—Sufficiency.

2. Evidence adduced in a prosecution for the offense of allowing females to remain in a saloon for the purpose of being supplied with liquor, *held* sufficient to show that defendant, who had formerly owned the saloon but had sold it to his nephew, was for the time being in actual charge and control of the saloon.

Same—Verdict—Evidence—Sufficiency.

3. A verdict of conviction of a public offense will not be disturbed on appeal where the evidence, though conflicting, is sufficient to sustain it.

Appeal from District Court, Yellowstone County; Sydney Fox, Judge.

WILLIAM CONWAY was convicted of suffering or permitting females to be or remain in a saloon for the purpose of being supplied with liquor, and appeals from the judgment of conviction and from an order denying him a new trial. Affirmed.

Mr. John T. Smith, and *Mr. Fred H. Hathhorn,* for Appellant.

Mr. Albert J. Galen, Attorney General, and *Mr. E. M. Hall,* Assistant Attorney General, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

The above-named defendant was convicted in Yellowstone county of the offense described in section 8385, Revised Codes, as follows: "It shall be unlawful for any owner, licensee, manager, clerk, agent, bartender, or other employee, having for the time being charge or control of any saloon, or any place connected therewith, either by doors or otherwise, to suffer or permit any female person to be or remain in such saloon, or place connected therewith, for the purpose of being there supplied with any kind of liquor whatsoever. Provided, that when a barroom is maintained in any hotel, this act shall not be construed to apply to the parts of the building where the other business of the hotel is transacted." He appeals from the judgment pronounced against him, and also from an order denying a new trial.

But two contentions are advanced in the appellant's brief: (1) That the information does not state a public offense, in that it fails to charge that the defendant was in control, "for the time being," of the saloon; (2) that the evidence is insufficient to support the verdict, and the verdict is contrary to law. These points will be considered together.

The information charges that the defendant was "then and there the owner and manager having charge and control" of the saloon. The cause was tried upon the theory that the defendant could not be convicted unless he was in actual charge at the time, even though he was owner or manager. The court instructed the jury that they must not convict the defendant unless they were satisfied that he was in actual charge for the time being, even though he might have been in general charge as owner, manager, agent or bartender. The information alleges that the defendant was "then and there" in charge and control. This allegation was amply sufficient to apprise the defendant that he was accused of being in control for the time being, and to enable him to understand the nature of the charge against him. Words used in a statute to define a public offense need not be strictly pursued in the information, but other words

conveying the same meaning may be used. (Revised Codes, sec. 9155.) We conclude, therefore, that the information was sufficient to charge the defendant with being in control "for the time being."

Defendant does not complain of the instructions, and cannot consistently do so, because the court distinctly told the jury that general ownership or management was not sufficient to bring the defendant within the terms of the statute. It only remains, then, to determine whether the verdict, in the light of the instructions, is supported by the evidence.

It appears that the defendant had previously owned the premises, but, having been convicted of the same offense for which he is now being prosecuted, had sold the place on June 12, 1907, to one Loman, his nephew. Two deputy sheriffs testified that on the night the second offense is alleged to have been committed they found defendant on the premises in company with other persons; that he ordered beer to be brought in, that two women drank of it; that defendant wore an apron, and stated to the officers that his relative had gone away and left him in charge of the place. This testimony was contradicted, but it was sufficient, if the jury believed it, to warrant the conclusion that defendant was, for the time being, in actual charge and control of the saloon. This being the case, we cannot disturb the verdict or judgment. (*State* v. *Allen*, 23 Mont. 118, 57 Pac. 725; *State* v. *Hurst*, 23 Mont. 484, 59 Pac. 911; *State* v. *Ford*, 26 Mont. 1, 66 Pac. 293; *State* v. *Howell*, 26 Mont. 3, 66 Pac. 291.).

We find no error in the record of which the defendant can complain, and the judgment and order appealed from are therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

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FEARON, RESPONDENT, v. MULLINS, APPELLANT.

(No. 2,573.)

(Submitted November 23, 1908. Decided December 19, 1908.)

[98 Pac. 650.]

Personal Injuries—Master and Servant—Complaint—Sufficiency—Evidence—Striking Out—Harmless Error.

Personal Injuries—Master and Servant—Complaint—Sufficiency.

1. The complaint of a domestic servant against her employer in an action for personal injuries, sustained while in the performance of her duties by reason of a fall into an opening on a porch, which alleged in substance that the plaintiff was required to perform a part of her work on the porch; that, when injured, she was at work there by personal direction of defendant; that the cover over the hole was insufficient to sustain the weight of a person; that the cover concealed the opening; that all of this was known to defendant but unknown to plaintiff, and that defendant negligently failed to inform her of the existence of the opening, was sufficient, both as to its allegation of defendant's negligence and its causal connection with the injury, to withstand attack by general demurrer or an objection to the introduction of evidence.

Same—Evidence—Striking Out—Error.

2. In answer to a question how the opening referred to in the foregoing paragraph was situated, defendant answered that it was at the end of the porch, and that it was not necessary for a person going over the porch for a certain purpose to go near it. *Held*, that it was error to strike out the latter clause of the answer as not responsive to the question, it having been a natural explanation of the preceding portion thereof.

Same—Exclusion of Evidence—When Harmless Error.

3. Error in striking out a part of an answer as not responsive was not prejudicial, where evidence of the same facts was afterward admitted without objection.

Same—Health—Opinion Evidence—Discretion.

4. The question of the competency of a layman to give his opinion as to the state of plaintiff's health prior to a personal injury for which damages are sought, is one left to the sound judgment of the trial judge, subject to review only in case of a clear abuse of discretion.

Same—Health—Opinion Evidence—Competency.

5. A lay witness who had known plaintiff for six years and had seen her frequently during that time was competent to testify as to her health prior to a personal injury; and the mere fact that he stated that it "is" good, instead of using the past tense of the verb, did not render his testimony incompetent, where it was obvious that he intended to do so.

Same—New Trial—Verdict Contrary to Evidence—Incorrect Assignment.

6. The statement in a motion for a new trial in a personal injury action, that the evidence showed that plaintiff knew, or in the exercise of reasonable care should have known, of the existence of a defect by reason of which she was injured and was therefore guilty of contributory negligence, and hence that the verdict in her favor was contrary

to the law, as correctly declared by the court in its charge, did not present the question whether the evidence was insufficient to sustain a verdict in her favor, but the question whether the jury reached the proper conclusion under the instructions given.

Same—Contributory Negligence—Verdict Contrary to Law.

7. Where the jury found on conflicting evidence in favor of plaintiff, upon the issue of contributory negligence, in a personal injury action, and the instructions were submitted in proper form to meet the respective hypotheses of both parties, their verdict cannot be said to have been contrary to law in this respect.

Same—Conflicting Evidence—View of Premises by Jury—Verdict—Conclusiveness.

8. The evidence in the above action having been conflicting and the premises where the accident occurred viewed by the jury, they were the exclusive judges to determine the facts, and with their determination in favor of plaintiff and the court's action in denying a new trial, the supreme court will not interfere on appeal.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by Sarah Fearon against Patrick Mullins. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Affirmed.

Mr. John F. Davies, for Appellant.

The complaint does not state facts sufficient to constitute a cause of action. In an action of this nature the facts must be stated showing the legal liability, and it is not sufficient to allege that the defendant has violated his duty. If the facts are stated, the allegation of duty is superfluous, and such a statement is useless where the facts are not stated. (6 Thompson on Negligence, sec. 7458; *Hewison* v. *City of New Haven,* 34 Conn. 136, 91 Am. Dec. 718; 6 Thompson on Negligence, sec. 7523; 14 Ency. of Pl. & Pr. 332; *Baltimore etc. R. R. Co.* v. *Wilson,* 31 Ohio St. 557; *Rosewarn* v. *Washington Gold Min. Co.,* 84 Cal. 219, 23 Pac. 1039; *Smith* v. *Buttner,* 90 Cal. 95, 27 Pac. 29.) The complaint in an action to recover damages for injuries caused by the failure of a master to furnish a safe place to work should set out the facts wherein the danger consisted and the causal connection between the defective place and the injury. (*Fearon* v. *Mullins,* 35 Mont. 237, 88 Pac. 794; 6

Thompson on Negligence, sec. 2527; *Stephenson* v. *Southern Pac. Co.*, 102 Cal. 143, 34 Pac. 618, 36 Pac. 407.) Plaintiff, in order to recover, must allege and prove, not only that she was injured, but that she was injured by reason of the negligence of the defendant, and that the negligence alleged was the cause of the injury. (*City of Hammond* v. *Winslow*, 33 Ind. App. 92, 70 N. E. 819.)

The construction of the human body has frequently been the subject of evidence, and as to whether, under given conditions, certain other conditions would result, has frequently called forth expert opinion of physicians. (*State* v. *Perry*, 41 W. Va. 641, 24 S. E. 634.)

When there is a vast preponderance of evidence in favor of defendant, and the defense is supported by numerous witnesses apparently entitled to credit, the plaintiff standing upon his own evidence, either unsupported or slightly supported, a new trial should be granted by the general term. (*Kaare* v. *Troy S. & I. Co.*, 139 N. Y. 369, 34 N. E. 901.) When the evidence greatly preponderates against the verdict, a motion for a new trial should be granted and the refusal of the trial court to grant such motion was error. (*Southern Ry.* v. *Lolar*, 135 Ala. 375, 33 South. 32.)

Where but one conclusion can be drawn from the evidence the finding of the trial court may be set aside. (*Nord* v. *Boston etc. Co.*, 33 Mont. 464, 84 Pac. 1116, 89 Pac. 647; *Mullins* v. *City of Butte* (Mont.), 95 Pac. 597.)

The master is not required to point out dangers which are readily ascertainable by the servant himself, if he makes an ordinarily careful use of such knowledge, experience and judgment as he possesses. (Labatt on Master and Servant, p. 531.) Where the facts are clear and only susceptible of one construction, the question of duty on the part of the master is for the court. (*Manley* v. *Paint Co.*, 76 Minn. 169, 78 N. W. 1050.) The servant cannot recover without making it appear that the defect was of such a nature as not to be discoverable in the reasonable and ordinary exercise of diligence in the course of his

duty. (*Central Bkg. Co.* v. *Kenny,* 58 Ga. 485.) Nor will he be heard to say that his ignorance of a danger was excusable if it could be discovered by a reasonable use of his faculties of observation. (*Illinois R. R. Co.* v. *Sanders,* 58 Ill. App. 117; *Evansville etc. R. Co.* v. *Duel,* 134 Ind. 156, 33 N. E. 355; *Chesson* v. *John L. Roper Lumber Co.,* 118 N. C. 59, 23 S. E. 925.)

Messrs. Mackel & Meyer, for Respondent.

The state of plaintiff's health prior to and at the time of trial being in dispute, testimony given by nonexperts or laymen with reference thereto is proper. (*Healy et ux.* v. *Visalia & T. R. Co.,* 101 Cal. 585, 36 Pac. 125; *State* v. *Baldwin,* 36 Kan. 1, 12 Pac. 322; 5 Ency. of Evidence, p. 656 et seq.; *Reininghaus* v. *Merchants' Life Assn.,* 116 Iowa, 364, 89 N. W. 1113; *West Chicago Street Ry. Co.* v. *Fishman,* 169 Ill. 196, 48 N. E. 447.) The question whether or not the plaintiff did see the opening and knew the dangerous condition thereof was properly a question for the jury. (*Hardesty* v. *Largey Lumber Co.,* 34 Mont. 151, 86 Pac. 29; *McCabe* v. *Montana Central Ry. Co.,* 30 Mont. 323, 76 Pac. 701.)

A new trial will not be granted by the supreme court, though the evidence seems to preponderate against the verdict. (*Schatzlein Paint Co.* v. *Passmore,* 26 Mont. 500, 68 Pac. 1113.) Where there is a substantial conflict in the evidence, refusal to grant a new trial cannot be held on appeal to be an abuse of discretion. (*Campbell* v. *Great Falls,* 27 Mont. 37, 69 Pac. 114.) Where the evidence is conflicting, the jury is to determine the facts, and their verdict will not be disturbed, unless clearly unsupported by the evidence before them. (*Kleinschmidt* v. *Dunphy,* 1 Mont. 118.)

A new trial will not be granted if there is some testimony to support the verdict, although there is a preponderance of evidence against it. (*Lincoln* v. *Rodgers,* 1 Mont. 217.) It must be clear that the jury has erred before a new trial will be granted

on the ground that the verdict is against the weight of evidence or unsupported by it. (*Orr* v. *Haskell*, 2 Mont. 225.)

These decisions dispose of appellant's contention that this court should interfere with the action of the lower court in refusing to grant appellant a new trial upon the ground that the evidence is insufficient to justify the verdict.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for damages for a personal injury. On a former appeal in this case the court reversed a judgment in favor of plaintiff and an order denying defendant's motion for a new trial, because of the want of substantial allegations in the complaint and for error in one of the instructions. (35 Mont. 232, 88 Pac. 794.) Another trial upon amended pleadings resulted in a verdict and judgment in favor of plaintiff for $2,000. From this judgment and an order denying him a new trial, the defendant prosecutes these appeals. He contends that the amended complaint does not state a cause of action, that the court erred to his prejudice in its rulings upon the admissibility of evidence, and that the verdict is contrary to the law as declared in the instructions.

1. The complaint alleges: That the defendant was, at the time mentioned, the owner of a house (describing it) in the city of Butte, and was occupying it as his residence; that on or about August 29, 1904, plaintiff was in his employ in the capacity of a domestic servant, and was engaged in the performance of her duties in and about said premises; and that it was the duty of the defendant to furnish her a reasonably safe place to be during the pursuit of her work. It then proceeds:

"(3) That the defendant carelessly and negligently failed and neglected to furnish the plaintiff with a reasonably safe place in which to work, and that the facts with reference thereto are as follows: That at the rear of the said house and on the porch thereof, where it became and was the duty of the plaintiff to perform a certain part of her work, there was a

large opening in the said porch, and below said opening there was an excavation many feet deep, to-wit, over six feet deep, and that on or about the said twenty-ninth day of August, 1904, and prior thereto, the defendant carelessly and negligently covered, and permitted to be covered, the said opening with a number of light boards and other materials so that the said opening could not be seen by the said plaintiff.

"(4) That the covering so placed over the said opening, as aforesaid, was insufficient to prevent a person from falling through into the excavation below, and when in such condition, as aforesaid, was dangerous.

"(5) That for a long time prior thereto the said defendant has [had] exclusive charge, control and possession of the said premises, and ought to have known, and as the plaintiff is informed and believes did know, of the dangerous condition of the said opening, and failed to exercise ordinary, or any, care, to make the same safe or reasonably safe.

"(6) That the plaintiff did not and could not know that the said opening was at the said place, and could not and did not know of the dangerous condition thereof, and the defendant carelessly and negligently failed to inform the plaintiff of the existence of the said hole on said porch or of the dangerous condition thereof.

"(7) That on the aforesaid date, the plaintiff was ordered and directed by the defendant to perform certain work upon said porch and near the said dangerous opening, to-wit, was ordered to place certain boxes and sacks filled with peas, etc., at a certain place beyond the said opening.

"(8) That the plaintiff obeyed the said order, and while performing her said duties, and while employed as a domestic servant, as aforesaid, and acting within the scope of her employment, she proceeded to place the said sacks, etc., at the point designated, and that in so doing she was compelled to, and did, pass over the opening, as aforesaid.

"(9) That on account of the fact that plaintiff did not know that the said opening was thereof [thereon?], and did not know

that the boards would not hold her said weight, and did not know that the said place was dangerous, said plaintiff stepped upon the said boards immediately above the said opening, and that the said boards and other material gave way, and the foot and leg upon which the plaintiff was then standing descended into the opening, as aforesaid." Then follow allegations as to the character and extent of the injury, the pain, physical and mental, resulting therefrom, and the expense incurred in procuring medical treatment. Judgment is demanded for $15,250.

The answer denies all the acts and omissions alleged as negligence on the part of the defendant, and alleges contributory negligence on the part of the plaintiff, and that she, knowing the condition of the opening at the time she entered defendant's employment, assumed the attendant risk.

The criticism made of the pleading is that it does not appear that the opening, in the condition in which it was at the time of the accident, was dangerous by reason of the insufficiency of the covering to support the weight of a person who happened to go upon it. It is also said that there is no causal connection shown between the alleged negligence of defendant and plaintiff's injury. These are, in substance, the same objections urged to the pleading on the former hearing, but we think it apparent that they are not meritorious.

It is alleged that the plaintiff was required to perform a part of her work upon the porch, and that upon the occasion of the injury she was at work there by special direction of the defendant. The description of the opening shows that it was a ventilator in the floor, and demonstrates that injury would result to one who, not knowing of it, or in an unguarded moment, might step into it. It appears with reasonable certainty that the covering over it was insufficient to sustain the weight of a person and prevent his falling through it into the excavation below. It is alleged that the covering concealed the opening, and that the condition of it as described was known to the defendant, and was not and could not be known to plaintiff, and that the defendant negligently failed to inform her of its ex-

istence. These allegations do not occur in exactly the order in which we state them, but they are all set forth with sufficient certainty to withstand attack made by general demurrer or an objection to the introduction of evidence, both as to the negligence of the defendant and its causal connection with the injury.

2. The plaintiff was employed by defendant to do general housework, including cooking, five days before the accident occurred. Some of the family supplies were kept in an ice chest upon the porch in question, and it was necessary for plaintiff to go there to obtain them, as well as to the back yard to obtain fuel. The defendant, having been called as witness, was asked on cross-examination how the ventilator was situated with reference to the kitchen door. He answered that it was at the extreme south—that is, remote from the door, at the end of the porch—and that a person going upon and over the porch for the purposes mentioned was not required to go near it. The last clause of the answer was, on motion of plaintiff, stricken out as not responsive to the question. A motion to strike out a portion of a similar answer made by another witness to substantially the same question was also sustained. Error is assigned upon these rulings, and we think there was error, because the added statement of the witness in each case was a natural explanation of the preceding portion of his answer in direct reply to counsel's question. The defendant suffered no prejudice, however, for the reason that one of these witnesses and two others were afterward permitted, without objection, to give a detailed description of the porch and the situation of the ventilator with reference to the line of passage ordinarily pursued by persons going in and out of the kitchen door in the performance of household duties. They were also allowed to state, by way of conclusion, that it was not necessary for one passing in and out to go near the ventilator.

One Tumolty, a witness for plaintiff, after stating that he was a brother in law of plaintiff, and that he had known her for about twelve years, was questioned, and gave answers as follows:

"Q. Did you know her intimately prior to the twenty-ninth day of August, 1904? A. No, I was over in Granite at that time. I did before that time for six years. I saw her frequently during that time. Q. Do you know what the nature of her health was prior to that time? A. It is [was?] good." Objection was made that this evidence was incompetent. It is argued that, while a layman may properly state his opinion as to the apparent condition of health of another as observed by him, the opinion must be based upon observations made at or about the time with reference to which the inquiry is made, and that the statement of this witness was incompetent because it is apparent he had had no opportunity to observe plaintiff's condition. The assumption that such evidence is admissible is correct. (1 Wigmore on Evidence, sec. 568; Lawson on Opinion and Expert Evidence, p. 519.) Its probative value depends in each case upon the opportunity the witness had to make observation. If he has made no observation, he is, of course, not competent to speak at all, and, in a given case, the observation may have been so remote from the time to which the inquiry is directed that his opinion may have no value. The question of his competency, however, must be left to the sound judgment of the trial judge, subject to review only in cases of a clear abuse of discretion. We do not think the court was in error in the ruling complained of here. The witness evidently intended to state, in reply to the questions put by counsel, that he had not known plaintiff intimately during the six years prior to the time of the accident, because he had been living in Granite (an adjoining county), but that he had seen her frequently during that time, and that her health appeared good. So, we think, the court and jury understood him, and his observation was sufficient to render his statement competent, though he used the present instead of the past tense. Other similar rulings of the court are assigned as error, but they are of no higher merit than the foregoing. We do not think they deserve special notice.

3. The court, among others on the subject of assumption of risk, gave the following instructions:

"(9) You are further instructed as a matter of law that an employee, in this case the plaintiff, cannot recover from an employer for an injury suffered in the course of his occupation by reason of the dangerous condition of the place wherein he works after he has knowledge of said defect or dangerous condition and continues to work without objection. The jury are instructed that if a servant discovers that the place in which he works is in a dangerous condition, and he does not stop going into and upon the dangerous place and give notice thereof to his employer, or his agents, but continues to use it, and is injured by reason of its being in such unsafe condition, then the employer will not be liable for the injury, if he is otherwise without fault.

"(10) The jury are further instructed that, when a person enters into service of another person, he thereby undertakes to run all the ordinary risks incident to the employment, including his own negligence, or unskillfulness, provided the person for whom he works, to-wit, the employer, has taken reasonable care and precaution to furnish a reasonably safe place in which to work."

"(15) You are further instructed that if the place of danger was known to the plaintiff, or if in the exercise of ordinary care she could have seen the danger, then she must be held to have assumed the risk of going upon the same."

It is contended that the evidence shows that the plaintiff knew, or by the exercise of reasonable care should have known, of the existence and condition of the ventilator. This being so, the verdict, it is argued, is contrary to the law as declared by the court. No question is made but that the instructions embody correct statements of the law on the subject; but, whether they do or not, the defendant would be entitled to a new trial if the evidence permitted no other conclusion than that stated by counsel, for, if this were the condition of the evidence, the jury should have so found and rendered their verdict for the defend-

ant. This ground of the motion does not present the question whether the evidence is insufficient to sustain the verdict, but the question whether the jury have, in arriving at their verdict as stated, reached the proper conclusion under the instructions given. (*King* v. *Lincoln*, 26 Mont. 157, 66 Pac. 836; *Murray* v. *Heinze*, 17 Mont. 353, 42 Pac. 1057; *Brumagim* v. *Bradshaw*, 39 Cal. 24; Spelling on New Trial and Appeal, sec. 254.)

Upon an examination of the evidence, we do not think the jury were bound to reach the conclusion that the plaintiff knew, or should have known, of the condition of the ventilator. The evidence is conflicting upon this point, and the jury might have found either way. The instructions were all submitted in proper form to meet the respective hypotheses of plaintiff and defendant, so that the jury could announce its verdict in accordance with that declaration of the law, made by the court, which agreed with their finding upon the evidence. It therefore cannot be said that the verdict is contrary to law. Having found the issues of fact as they did, the jury were bound to return a verdict against the defendant.

4. The evidence introduced on the part of the plaintiff tended to show: That up to the time she entered the employ of the defendant she was in good health and able to earn a living by her labor for herself and her two children; that at that time the existence of the ventilator was not known to her, nor was it discovered by her until she fell into it, it being until that time concealed by a covering of light boards; that in going upon and over the porch in quest of supplies and fuel she was not required to go near it; that on the afternoon of the day of the injury she was directed by the wife of the defendant to gather up from the floor of the porch some cases of eggs and sacks of vegetables, which had been placed there on that day or the day before, and pile them in the corner near the ventilator, and proceeded to do so; that not knowing that the boards, which she observed, concealed the opening, she stepped upon them, and by their giving way was precipitated into the excavation below, suffering injury by bruises upon her body and displace-

ment of her womb, producing excessive hemorrhages, necessitating surgical treatment from time to time, and that this condition is probably permanent. Defendant's evidence contradicted this evidence on almost every point. Not only so, but it also tended to show that the ventilator opening, fourteen by twenty-two inches in size, was situated in a corner of the porch so close to the walls bounding it on two sides that it is questionable whether a person could without design go over it and fall into it in the manner described by plaintiff. Under the directions of the court, however, the jury inspected the porch and made their findings upon the evidence as exemplified and explained by the physical conditions as they existed at the time of the accident. It was their exclusive province to determine the facts upon the conflicting evidence, and this court may not disturb their finding or overturn the discretionary action of the district court thereon in denying the motion for a new trial. We cannot say that there was not substantial evidence to support the plaintiff's complaint, or that the defendant's defense of contributory negligence or assumption of risk was established by a preponderance of the evidence.

5. The contention is made in the brief of counsel, though there is no assignment of error on the subject, that a new trial should have been granted on the ground of the misbehavior of one of counsel for plaintiff during the progress of the trial. We shall not notice the argument of counsel, for the reason that on the showing made the contention is wholly without merit.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SMITH concur.

IN RE FLEMING'S ESTATE. LOCKWOOD, APPELLANT, v. FLEMING, EXECUTRIX, RESPONDENT.

(No. 2,562.)

(Submitted November 27, 1908. Decided December 21, 1908.)

[98 Pac. 648.]

Probate Proceedings—Estates—Partial Distribution—Questions not Determinable—Motions—Review.

Estates—Partial Distribution—Questions not Determinable.

1. *Held*, on appeal from an order sustaining objections to a petition for *partial* distribution of an estate, filed pursuant to the provisions of section 7669, Revised Codes, that the questions of heirship, amount of distributive share claimed, etc., cannot be determined in a proceeding brought under that section; this may only be done as provided by sections 7670-7672, Revised Codes, or upon *final* distribution of the estate.

Appeal—Motions.

2. Where a motion is made upon several grounds, and the order granting it is general in its terms, the order will be sustained on appeal if it can be upon any of the grounds of the motion.

Appeal from District Court, Powell County; Geo. B. Winston, Judge.

IN THE MATTER of the estate of John Fleming, deceased. Petition by Ellen Agnes Lockwood against Johanna Fleming, executrix, for partial distribution of the estate. From an order sustaining objections to the petition, petitioner appeals. Affirmed.

Mr. Edward Scharnikow, and *Messrs. Walsh & Nolan*, for Appellant.

Mr. S. P. Wilson, and *Messrs. Rodgers & Rodgers*, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On February 12, 1908, Ellen Agnes Lockwood filed in the district court of Powell county an amended petition in which she

alleges that she is the daughter of John Fleming, who died testate in 1906; that her father at the time of his death owned property of the value of $8,900; that her father left a will which had theretofore been admitted to probate; that Johanna Fleming was designated in the will of John Fleming as executrix, and duly qualified as such; that notice to creditors had been duly given and an inventory of the property duly made and returned. It is then alleged that John Fleming left surviving him his wife, Johanna Fleming, and certain children, among them the petitioner; that in his will he omitted to make any provision for any of the children, and that it does not appear that such omission was intentional; that the petitioner is therefore entitled to a one-twelfth interest in the property; that the time for the presentation of claims against the estate has expired, and that the estate is only indebted to the extent of $412.62; and that the petitioner is ready, able and willing to execute to the executrix a good and sufficient bond or undertaking as security for the payment of her proportion of the debts of the estate. The prayer of the petition is that the petitioner have distributed to her her share of the estate after the payment of the debts and expenses of administration be made. To this amended petition is attached a copy of the will of John Fleming, by the terms of which all his property was bequeathed to his wife, Johanna Fleming, and in which there is not any mention of any children. To this amended petition the executrix filed written objections, specifying six separate grounds, No. 5 of which is as follows: "That this petition is not the proper proceedings to be brought when there is any dispute as to the persons entitled to have said estate distributed to them, nor where the right of the petitioner is not clear, and that the petition shows that petitioner's right to have distribution to her is not clear." The court sustained the objections, and the petitioner has appealed from the order. A number of questions have been argued by counsel for the respective parties, but in our opinion objection No. 5 above presents the only question before this court.

The petition was filed pursuant to section 7669, Revised Codes. Under the circumstances, as disclosed by the petition, the court, in order to grant the petition, must have determined that Mrs. Lockwood was an heir of John Fleming, deceased; that she is entitled to a distributive share of his estate, and the precise amount of such share, in addition to the other findings required to be made by the section referred to above. The matter for our determination is: May a district court determine such questions in a proceeding for partial distribution commenced under that section?

In sections 7670, 7671 and 7672, Revised Codes, the legislature has provided a complete procedure for determining the rights of all persons to an estate and all interests therein, and to whom distribution thereof should be made; but in the concluding paragraph of section 7672 above it is said: "Nothing in the last three sections shall be construed to exclude the right upon final distribution of any estate to contest the question of heirship, title or interest in the estate so distributed, where the same shall not have been determined under the provisions of sections 7670, 7671, and 7672, but where the questions shall have been litigated under the provisions of these sections, the determination thereof, as therein provided, shall be conclusive in the distribution of said estate." We find, then, that in addition to the complete mode provided in sections 7670, 7671 and 7672, the question of heirship and the interest of any heir may also be determined upon a proceeding for the *final* distribution of an estate. When the legislature had provided the ample procedure given in sections 7670, 7671 and 7672, and then, out of abundance of caution, had said that this procedure shall not be held to be exclusive of the right to have the question of heirship, title, or interest in an estate determined upon proceedings for final distribution, it must be held upon well-known rules of statutory construction to exclude every other procedure for determining such questions.

In support of their contention that such questions may be determined upon an application for partial distribution, under

section 7669 above, counsel for appellant cite *Oxarart's Estate,* 78 Cal. 109, 20 Pac. 367; *Sheid's Estate,* 129 Cal. 172, 61 Pac. 920, and *Jessup's Estate,* 81 Cal. 408, 21 Pac. 976, 6 L. R. A. 594. Neither the first nor the second case is in point, for in each the proceeding was upon a petition for final distribution, and such proceeding was specifically authorized by section 1664, California Code of Civil Procedure, which contains the same provision as our section 7672, quoted above. And so here, if Mrs. Lockwood's petition had been presented to the district court upon proceedings for final distribution, we would not hesitate a moment to say, as did the supreme court of California in the two cases cited, that she was entitled to have the questions determined under the direct authority of that portion of section 7672 quoted above; but this is not such a procedure, but is a proceeding for partial distribution under section 7669.

In legal effect, the facts presented in *Re Jessup's Estate* are parallel with those in the case now under consideration, and the supreme court of California held that upon a petition for partial distribution the questions presented here may be determined. The court disposed of the subject in a single paragraph, as follows: "The position that the heirship of the petitioner must be established in the manner provided in section 1664 of the Code of Civil Procedure before he can maintain a proceeding for partial distribution, is not well taken. The proceeding provided for in the section referred to is not exclusive of the right to have the question determined at the hearing of the application for distribution. (*Estate of Oxarart,* 78 Cal. 109, 20 Pac. 367.)" Now, when we remember that in the *Oxarart Case* the court did not decide any such question at all, but did decide an entirely different question conformably with direct statutory authority, and that no such authority whatever is given by the California Code to determine such a question upon a petition for partial distribution, we are driven to the conclusion that in deciding the *Jessup Case* the court did not take into consideration the difference between that case and the *Oxarart Case*—did not dif-

ferentiate between a proceeding directly authorized by law and one for which no statutory authority can be found.

In our opinion the decision in the *Jessup Case* cannot be sustained upon reason or authority, but is directly contrary to the meaning which must be given to our sections 7670, 7671 and 7672, which is that the procedure therein provided and the procedure upon final distribution are exclusive. When the statute says in unmistakable terms that these questions are to be determined in proceedings instituted under sections 7670, 7671 and 7672, or in proceedings upon final distribution, it clearly implies that such questions cannot be determined in any other proceedings. Upon rehearing the California court (81 Cal. 408, 22 Pac. 742, 6 L. R. A. 594) reversed its former decision in the *Jessup Case*, though upon another question, and in this latter decision there is not any mention of the matter quoted above.

In our opinion, the language of the statute (section 7669 above), to the effect that "any heir, devisee, or legatee may present his or her petition to the court or judge for the distribution of the net proceeds of the share of the said estate to which he or she will be entitled," is susceptible of but one meaning, viz., that any heir, devisee, or legatee shown by the record to be such, and concerning whose right to inherit there is not any question raised, may ask for distribution to him of the share of the estate which the record shows he is entitled to receive, and about which there is not any controversy.

This court has repeatedly declared that where a motion is made upon several grounds, and the order sustaining it is general in terms, such as the one now under consideration, the order will be sustained if it can be upon any of the grounds of the motion. Without considering the other grounds of the motion, the district court was correct in sustaining the motion on the ground specified as No. 5 above, and the order will be affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

LEYSON, RESPONDENT, *v.* DAVENPORT ET AL., APPELLANTS.

(No. 2,560.)

(Submitted November 25, 1908. Decided December 21, 1908.)

[98 Pac. 641.]

Real Property—Wrongful Occupation and Detention—Mesne Profits—Damages Recoverable.

1. In an action for the wrongful occupation and detention of real property, the rental value thereof during the time of such wrongful occupation was provable as an element of damages, under an allegation that the "reasonable value of the rents and profits for the use and occupation of the premises" was a certain sum; section 6069, Revised Codes, providing that "the detriment caused by the wrongful occupation of real property is deemed to be the value of the use of the property for the time of such occupation," etc.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by John H. Leyson against Lee Davenport and others. From an order granting plaintiff a new trial, defendants appeal. Affirmed.

Mr. C. M. Parr, for Appellants.

Citing: *Matthias* v. *Foster,* 102 Ga. 556, 28 S. E. 606; *Isaac* v. *Minkofsky,* 20 Misc. Rep. 347, 60 N. Y. Supp. 506; *Preston* v. *Hawley,* 101 N. Y. 588, 5 N. E. 770; *Hill* v. *Coal Valley Min. Co.,* 103 Ill. App. 41; *Cambridge Lodge No. 9, K. P.,* v. *Routh,* 163 Ind. 1, 71 N. E. 148; 2 Boone on Code Pleading, p. 238; *Webbe* v. *Weaver,* 79 Ill. App. 657; *Alt* v. *Gray,* 56 N. Y. Supp. 657; *Atlanta K. & N. Ry. Co.* v. *McHan,* 110 Ga. 543, 35 S. E. 634; *Fender* v. *Rodgers,* 97 Ill. App. 280; *Janouch* v. *Pence,* 3 Neb. (Unof.) 867, 93 N. W. 217; *Adsit* v. *Kaufman,* 121 Fed. 355, 58 C. C. A. 33; *Cole* v. *Thompson,* 134 Iowa, 685, 112 N. W. 178.

Mr. E. N. Harwood, for Respondent.

Citing: *Wallace* v. *Berdell,* 101 N. Y. 14, 3 N. E. 769; *Nash* v. *Sullivan,* 32 Minn. 190, 20 N. W. 144; *Long-Bell Lumber Co.*

v. *Martin*, 11 Okl. 192, 66 Pac. 328; *City of Oklahoma City* v. *Hill*, 6 Okl. 114, 50 Pac. 253; *Patterson* v. *Ely*, 19 Cal. 28; *Yount* v. *Howell*, 14 Cal. 468; *Hicks* v. *Hering*, 17 Cal. 567; *Columbia & P. S. Ry. Co.* v. *Histogenetic M. Co.*, 14 Wash. 475, 45 Pac. 29.

MR. JUSTICE SMITH delivered the opinion of the court.

The district court of Silver Bow county sustained a motion to exclude all evidence under the following complaint:

"For cause of action against said defendants, plaintiff complains and alleges:

"(1) That on the —— day of July, 1899, plaintiff's predecessor in interest, James S. Watson, was the owner seised in fee and possessed and entitled to the possession of that certain lot or parcel of land and the valuable dwelling-house thereon, situate in the city of Butte, county of Silver Bow, state of Montana, more particularly described as follows, to-wit [description], and on or about said date said James S. Watson and one R. S. Feurtado entered into an agreement, by the terms and provisions of which the said Watson agreed to sell and convey said property to said Feurtado for and in consideration of the sum of $4,779.20, to be paid in 30 installments of divers sums of money, which sums said Feurtado promised in and by the terms of 30 promissory notes made and delivered by him on or about the date aforesaid to pay to said James S. Watson for the purchase of said property; that by the terms and conditions of the first of said notes said Feurtado promised to pay to said Watson on or before October 1, 1899, the sum of $172.50, the same being the largest amount mentioned in any of said promissory notes, and by the terms and conditions of the other 29 of said promissory notes there became due and payable an installment of over $150 of said agreed purchase price at the end of each period of three months succeeding the date last aforesaid.

"And it was further expressly agreed by and between said James S. Watson and R. S. Feurtado in and by the terms of said agreement that time is of the essence of said agreement; and it was further agreed by the terms, tenor, and effect of said

agreement that, in the event of default of payment of any of said installments mentioned in either of said promissory notes when due and payable according to the terms thereof, then all right on the part of said Feurtado to purchase said premises or otherwise in relation thereto became and was forfeit, null, and void.

"And it was further provided and agreed in and by the terms, tenor, and effect of said agreement that said R. S. Feurtado shall pay and discharge at maturity all taxes, assessments, liens, and other encumbrances then existing on said property at the time of making said agreement or thereafter assessed or levied thereon.

"(2) That said R. S. Feurtado entered into and used said premises for some time prior and up to about the 1st day of May, 1902.

"(3) That said R. S. Feurtado made default, failed and neglected to pay any of said installments which he promised as aforesaid to pay for the purchase of said property; and he also made default, failed, and neglected to pay the taxes duly assessed and levied on said property, to-wit, taxes levied by said county of Silver Bow in the sum of $28.39, and by the city of Butte in the sum of $20.80, for the year 1902, and taxes levied on said property by said city in the sum of $20.80, and by said county in the sum of $28.39, for the year 1903, and said property was heretofore sold for said taxes, and said Feurtado made default, failed, and neglected to pay any of said promissory notes or to perform any condition of said agreement made by and between him and said Watson to be done and performed by said Feurtado.

"(4) That all the while from and after default of payment of the first of said series of promissory notes by said Feurtado on October 1, 1899, when the same became due and payable according to the terms thereof, he, the said Feurtado, had no right, title, or interest whatsoever in or to or in relation to said property, and all the while he occupied said property after said last-mentioned date he became indebted to said Watson and his successors in interest for the use and occupation thereof.

"(5) That during all the times herein mentioned the title to said property in fee simple absolute was standing in the name of said James S. Watson, as shown by the public records of said county of Silver Bow, until it was sold, assigned, and conveyed to plaintiff as hereinbelow set forth.

"(6) That on April 17, 1902, 11 of said promissory notes, the principal of which aggregates $1,864.50, were past due and wholly unpaid, and said R. S. Feurtado had not only made default in the payment thereof, but had failed and neglected to perform any conditions of said agreement with said James S. Watson to be done and performed by said Feurtado; that at some time on or between the 17th day of April, 1902, and the 1st day of May, 1902, the said defendant Lee Davenport without right, title, or interest in said premises, and acting in collusion with said Feurtado, entered into said premises and into the use and occupation of the valuable dwelling-house situate thereon and occupied the same continuously from the 1st day of May, 1902, to the 1st day of January, 1903.

"(7) That on or about January 1, 1903, the defendant Lee Davenport without right, title, or interest in said premises, and acting in collusion with his brother, the defendant, John R. Davenport, and Anna Davenport, caused the latter to enter into and occupy said premises as pretended tenant of said Lee Davenport, and the said John R. Davenport, Anna Davenport, and Lee Davenport acting together in collusion have occupied and had the use and benefit of said premises continuously ever since said 1st day of January, A. D. 1903, until the 30th day of November, 1904, a period of 23 months, whereby said defendants became indebted to said James S. Watson and his successors in interest and assigns for the reasonable value of the use and occupation of said premises during said period, and interest thereon at lawful rates.

"(8) That the reasonable value of the rents and profits for the use and occupation of said premises during said period from January 1, 1903, to November 30, 1904, is $40 per month,

amounting to $920, but no part of which has been paid, although payment thereof has been heretofore demanded.

"(9) That heretofore, to-wit, on October 17, 1904, the said James S. Watson and his wife M. Lillian Watson, for valuable consideration, to-wit, over $4,000, to them paid by plaintiff, sold, assigned, transferred, set over, and delivered said premises and all their rights, demands, claims, accounts, and rights of action against defendants and all other persons for use and occupation thereof to this plaintiff, and ever since the last-mentioned date plaintiff has been and now is the owner and holder thereof, and plaintiff has demanded payment of said sum of $920 and legal interest thereon for the use and occupation of said premises by defendants as aforesaid but no part thereof has been paid.

"Wherefore, plaintiff demands judgment against said defendants for the sum of $920 and interest thereon from November 30, 1904, until paid, at the rate of 8 per centum per annum and all other proper relief."

The grounds of the motion were (1) "that the complaint does not state facts sufficient to constitute a cause of action"; and (2) "that the action is improperly brought against defendants for the reason that there never was any relation of landlord and tenant existing between plaintiff and defendants nor either of them, nor is there any privity of contract such as would make defendants, or either of them, liable to plaintiff for use and occupation of the premises in question." The court afterward entered an order granting the plaintiff a new trial, and from that order the defendants have perfected an appeal. We think the trial court was correct in granting a new trial.

Appellants advanced the contention that the action for use and occupation is founded on contract, express or implied, and, to sustain the action, it must appear that the relation of landlord and tenant existed between the parties or their privies. The following cases are cited to sustain this position, viz.: *Atlanta K. & N. Ry. Co.* v. *McHan*, 110 Ga. 543, 35 S. E. 634; *Fender* v. *Rogers*, 97 Ill. App. 280; *Janouch* v. *Pence*, 3 Neb.

(Unof.) 867, 93 N. W. 217; *Adsit* v. *Kaufman*, 121 Fed. 355, 58 C. C. A. 33; *Cole* v. *Thompson*, 134 Iowa, 685, 112 N. W. 178.

In this state there is but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs, and the complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language. In the case of *Long-Bell Lumber Co.* v. *Martin*, 11 Okl. 192, 66 Pac. 328, the supreme court of Oklahoma said: "The relation of landlord and tenant never existed in the case. The case is one of occupation of land without color of title; but that fact would not prevent the plaintiff from recovering damages in this action, even if he had averred that the rental value of the premises amounted to a certain specific sum, since it has been expressly declared by this court that the 'rental value of the premises during the time the party is forcibly and unlawfully kept out of possession is the proper measure of damages.'"

Mr. Justice Field said in *Patterson* v. *Ely*, 19 Cal. 28: "The allegation of the value of the 'use and occupation, rents, and profits' of the premises for the period during which the defendants were in the wrongful possession and excluded the plaintiffs. was sufficient to charge the defendant without any averment that they received such rents and profits. These terms 'rents and profits,' are not used in a technical sense. The whole averment is, in effect, only that the value of the use of the premises, whilst the plaintiffs were excluded from their enjoyment, was the amount stated—a very proper averment as the basis of the damages claimed for the wrongful detention of the property."

Our Code, section 6069, under the Article heading "Damages for Wrongs," and the section heading "Wrongful Occupation of Real Property," provides: "The detriment caused by the wrongful occupation of real property, in cases not embraced in sections 6070, 6076 and 6077, of this Code, or provided in the Code of Civil Procedure, is deemed to be the value of the use of the property for the time of such occupation, not exceeding five years next preceding the commencement of the action or

proceeding to enforce the right to damages, and the costs, if any, of recovering the possession."

The supreme court for Washington in *Columbia & P. S. R. Co.* v. *Histogenetic Medicine Co.,* 14 Wash. 475, 45 Pac. 29, used this language: "Owing, no doubt, to the change of procedure wrought by the Codes in the various states, the action for mesne profits is now largely treated as if it were one of contract or for use and occupation." In the case of *Woodhull* v. *Rosenthal,* 61 N. Y. 382, the court said: "The action for mesne profits is now in substance an action for use and occupation, and the complaint is to be drawn on that theory; and the court is to render judgment, as in actions of *assumpsit,* for use and occupation." (See, also, *Holmes* v. *Davis,* 19 N. Y. 488.) Sedgwick and Wait, in their work entitled "Trial of Title to Land," say (section 649): "It is established by a preponderance of the authorities that the action [modern action for mesne profits] has been divested of many of the peculiarities of an action of trespass; or, rather, that it has acquired the characteristics of an action *ex contractu,* and the recovery in the modern practice is largely regulated by the principles governing actions upon contract as distinguished from actions of pure tort."

In the case at bar the plaintiff claims damages in an amount equal to the "reasonable value of the rents and profits for the use and occupation of the premises" during the time the defendants wrongfully occupied the same, to-wit, in the sum of $920. We are of opinion that the "value of the use of the property" may properly be arrived at in this way.

The order appealed from is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

HAGERTY, RESPONDENT, v. MONTANA ORE PUR. CO. ET AL., DEFENDANTS; E. WILSON, APPELLANT.

(No. 2,558.)

(Submitted November 25, 1908. Decided December 21, 1908.)

[98 Pac. 643.]

Personal Injuries—Mines—Master and Servant—Principal and Agent—Misfeasance—Liability of Agent—Proximate Cause—Instructions.

Instructions—Request—When Refusal Proper.

1. Where a requested instruction covered the same ground as one given, refusal to give it was not error.

Personal Injuries—Master and Servant—Safe Place to Work—Reasonable Care—Question for Jury—Nonsuit.

2. The question whether defendants exercised reasonable care in providing plaintiff employee a safe place in which to work, where it appears that he was injured by the sticking of a cage in a mining shaft, the defect in which was known to defendant superintendent, and where there were other shafts which could have been used in safely lowering workmen into and hoisting them from the workings, was properly submitted to the jury, even though it was shown that the superintendent spared neither pains nor money to keep the shaft in running order.

Same—Negligence of Agent—Liability for Injury—Concurring Causes.

3. If defendant mining superintendent's negligence in maintaining a defective shaft and, with knowledge of its dangerous condition, permitting its use for lowering and hoisting workmen, was a concurring cause of plaintiff employee's injury by reason of such defect, he was not relieved from liability merely because the negligence or incompetency of the engineer in charge of the engine operating the cage may have contributed to the injury.

Same — Principal and Agent — Nonfeasance — Misfeasance — Liability of Agent.

4. The term "nonfeasance" refers to an agent's omission to perform a duty which he owes to his principal by virtue of the agency and for which he is responsible to his principal only; but, whenever the agent's omission consists of failure to perform a duty which he owes to third persons, then, as to such persons, his omission is "misfeasance" for which he is responsible.

Same.

5. The conduct of a superintendent of a mine who had the same control of his company's property as the company would have had, had it been a natural person and attending to the management as such, in negligently maintaining a defective shaft and permitting its use by employees unaware of its dangerous condition, amounted, not to nonfeasance, but to misfeasance, for injury to an employee on account of which he was liable, where his negligence, combined with that of the engineer in charge, was found by the jury to have been the proximate cause of the accident.

Same—Negligence of Agent—Concurring Cause—Question for Jury.

6. Whether the defendant superintendent's negligence, as set forth in the preceding paragraph, was a proximate cause of the employee's injury, where the negligence or incompetency of the engineer operating the hoisting engine also contributed to the happening of the accident, was a question of fact properly submitted to the jury.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by Johnston T. Hagerty against the Montana Ore Purchasing Company, Elliott H. Wilson, and others. From a judgment for plaintiff, and from an order denying a new trial, defendant Wilson appeals. Affirmed.

Mr. Charles R. Leonard, and *Messrs. Gunn & Rasch,* for Appellant.

For mere omission of duty,—for nonfeasance, as distinguished from misfeasance,—the weight of authority is to the effect that the agent is not liable to third persons. (*Kelly* v. *Chicago & A. Ry. Co.,* 122 Fed. 286; *Carey* v. *Rochereau,* 16 Fed. 87; *The Bell of the Coast,* 56 Fed. 251; *Bryce* v. *Southern Ry. Co.,* 125 Fed. 958; see, also, *Colvin* v. *Holbrook,* 2 N. Y. 129; *Murray* v. *Usher,* 117 N. Y. 542, 23 N. E. 564; *Van Antwerp* v. *Linton,* 89 Hun, 417, 35 N. Y. Supp. 318, affirmed in 157 N. Y. 716, 53 N. E. 1133; *Burns* v. *Pethcal,* 75 Hun, 437, 27 N. Y. Supp. 499; *Scheller* v. *Silbermintz,* 50 Misc. Rep. 175, 98 N. Y. Supp. 230; *Delaney* v. *Rochereau,* 34 La. Ann. 1123, 44 Am. Rep. 456; *Cincinnati Ry. Co.* v. *Robertson,* 115 Ky. 858, 74 S. W. 1061; *Drake* v. *Hagan,* 108 Tenn. 265, 67 S. W. 470; *Feltus* v. *Swan,* 62 Miss. 415; *Henshaw* v. *Noble,* 7 Ohio St. 226; *Labadie* v. *Hawley,* 61 Tex. 177, 48 Am. Rep. 278; *Bullock* v. *Gaffigan,* 100 Pa. 276; Bishop on Noncontract Law, secs. 628, 695; 1 Kinkead on Torts, pp. 124, 125, sec. 68; 1 Shearman and Redfield on Negligence, 5th ed., secs. 243, 245; Black's Law & Practice in Accident Cases, sec. 72.)

An intermediate servant is not liable to a third person for the torts of the general servant; for these the master only is liable,

since the general servant is not the servant of the intermediate servant, but the servant of the master. (5 Thompson on Negligence, sec. 5772; *Brown* v. *Lent*, 20 Vt. 529; *Bath* v. *Caton*, 37 Mich. 199; *Bacheller* v. *Pinkham*, 68 Me. 253; *Hewett* v. *Swift*, 3 Allen (Mass.), 420.)

If the accident which occasioned the respondent's injuries was due to the negligence, or the misfeasance or nonfeasance of anybody connected with the operation of the Minnie Healy mine, it was that of the foreman, or shift boss, in charge of the "Chippie" shaft, and of the person who operated the engine in lowering the cage upon which the injury was sustained. There is a complete failure of proof to connect the appellant, by reason of any act of commission or omission on his part within the line of his duty, with the accident and the plaintiff's injury. Where it is sought to recover upon the ground of an imputed negligent act, the evidence ought to be so direct and tangible as to satisfy the conscience of both court and jury that a case is made out. (*Atwood* v. *Chicago R. I. & P. Ry. Co.*, 72 Fed. 450; *Shaw* v. *New Year Gold Min. Co.*, 31 Mont. 138, 77 Pac. 515.)

The negligent acts of the incompetent persons who operated the engine "broke the chain of causation between the prior alleged negligence of the defendant and the injury of the plaintiff, insulated his omissions from the plaintiff's hurt, and discharged the defendant from all liability for it." (*American Bridge Co.* v. *Seeds*, 144 Fed. 605, 75 C. C. A. 407, 11 L. R. A., n. s., 1046.)

Mr. S. T. Hogevoll, and *Messrs. Maury & Templeman*, for Respondent.

A servant or agent is liable for a negligent omission or nonfeasance causing injury to a third person, where he would be liable if acting as principal. (*Mayer* v. *Thompson-Hutchinson Bldg. Co.*, 104 Ala. 611, 53 Am. St. Rep. 88, 16 South. 620, 28 L. R. A. 433; *Baird* v. *Shipman*, 132 Ill. 16, 22 Am. St. Rep. 504, 23 N. E. 384, 72 L. R. A. 128; *Osborne* v. *Morgan*, 130 Mass. 102, 39 Am. Rep. 437; *Ellis* v. *McNaughton*, 76 Mich. 237, 15 Am. St.

Rep. 308, 42 N. W. 1113; *Campbell* v. *Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503; *Harriman* v. *Stowe*, 57 Mo. 93; *Wright* v. *Wilcox*, 19 Wend. 343, 32 Am. Dec. 507; *Lough* v. *John Davis & Co.*, 30 Wash. 204, 94 Am. St. Rep. 848, 70 Pac. 491, 59 L. R. A. 802; *Southern Ry. Co.* v. *Reynolds*, 126 Ga. 657, 55 S. E. 1039; *Ellis* v. *Southern Ry. Co.*, 72 S. C. 465, 52 S. E. 228, 2 L. R. A., n. s., 378.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was commenced by Johnston T. Hagerty against Elliott H. Wilson and others to recover damages for injuries alleged to have been sustained by the plaintiff as the result of the negligence of the defendants.

During 1904 the Hypocka Mining Company, a foreign corporation, was operating the Minnie Healy mine, in Meaderville, Silver Bow county. The defendant Wilson was the superintendent at the mine, and was actively in charge of the business of the Hypocka Mining Company in Montana. The Hypocka Company had a working arrangement with the Montana Ore Purchasing Company, by which the latter company furnished its electricians to the former to do electrical work in the Minnie Healy mine. In the course of its mining operations in the Minnie Healy mine, the Hypocka Company caused to be opened a particular shaft, designated in the pleadings and evidence as the "Chippie" shaft. This shaft was a comparatively new one and had been properly timbered, but on account of the swelling of the ground, caused by disintegration of the country rock and a consequent movement of the ground, the shaft was so compressed that for several months before the accident to Hagerty the cage running in that shaft had frequently stuck on its descent. To such an extent had the usefulness of the shaft been impaired that some time before Hagerty's injury occurred the shaft had been condemned, the engineers on the engine operating the cage had been taken from their work, and the shaft thereafter was used principally for the purpose of repairing

water-pipes and electrical apparatus in it. On July 26, 1904, the Hypocka Company called upon the Montana Ore Purchasing Company for electricians to do some work in the "Chippie" shaft between the 1,000 and 1,100 foot levels. Hagerty, an electrician in the employ of the Montana Ore Purchasing Company, was detailed to do this work, and while so engaged, and on July 27, he was requested to make some repairs about the 600-foot level. It appears that, when this "Chippie" shaft was used, an engineer from elsewhere in the Minnie Healy mine was called to operate the engine which lowered and raised the cage. At the time Hagerty was injured, one Greenleaf, or Greenough, went on the engine to lower the cage. It does not appear at whose suggestion or direction this man assumed to act as engineer, for he was not in fact an engineer, and did not have a license to operate an engine. However, he undertook to lower the cage with Hagerty and his helper, and, when it was between 500 and 600 feet from the surface, the cage struck, and, the engine not being stopped at once, from 10 to 25 feet of cable came down into the cage, which was not lighted, and coiled about the feet of Hagerty and his helper. After being thus suspended for some time, the cage finally worked through the pinched portion of the shaft by its own weight, and suddenly fell to the length of the slack cable. The cable had apparently become so coiled about one of Hagerty's feet that, when the cage dropped, the cable practically cut off his foot, or at least injured it to such an extent that amputation was necessary. It appears that this dangerous condition of the "Chippie" shaft was known to Wilson, but was not known to Hagerty. In brief, these are the facts as disclosed by the record.

There is not any disputed question of fact presented, for the defendants did not offer any testimony. A motion for nonsuit was sustained as to the Montana Ore Purchasing Company, and denied as to defendants Wilson and Hypocka Company. The court was asked, but refused to give, instructions 4 and 9, but among others gave instruction No. 6. The instructions just referred to are as follows:

"No. 4. [Refused.] You are instructed that if the plaintiff entered the shaft at the time he was injured without the knowledge of the defendant Elliott H. Wilson, and by invitation or direction of some servant of the Hypocka Mining Company, other than said Wilson, and such person knew the condition of said shaft, your verdict should be for the defendant Wilson."

"No. 9. [Refused.] You are further instructed that, if you find from the evidence that the injury would not have occurred except for the incompetency or negligence of the engineer in charge of the engine operating the cage in the shaft, then the condition of said shaft was not the proximate cause of the injury, and your verdict should be for the defendant Wilson."

"No. 6. [Given.] You are instructed that, if the injury to the plaintiff was occasioned solely by the negligence or incompetency of the engineer in charge of the hoisting engine operating the cage in the shaft in which the injury occurred, your verdict should be for the defendant Elliott H. Wilson."

The jury returned a verdict in favor of the plaintiff and against the defendants Wilson and the Hypocka Mining Company, and, from the judgment entered thereon and from an order denying him a new trial, Wilson appeals.

We think that the proposed instruction No. 4 above was properly refused. Wilson's own testimony, offered on behalf of plaintiff, discloses that he knew the condition of the "Chippie" shaft; knew that the cage stuck occasionally; knew that the sticking of the cage would endanger life or limb if it got away as it did on the occasion of Hagerty's injury; knew that men were going down the shaft between January and August, 1904, and, in fact, had gone through there occasionally himself. He knew, also, that Hagerty was working in the shaft on the day before he was injured. Under these circumstances the offered instruction was not applicable to the facts of the case. The determining factor is not whether Wilson knew that Hagerty was making the particular trip which he did when he was injured, but whether he knew, or ought to have known, that

Hagerty was working there at the time upon the invitation of the Hypocka Mining Company.

We think, also, that offered instruction No. 9 above was properly refused. No. 6, given, completely covers the same ground. There is not any difference between the two instructions in principle. The difference is in verbiage only. No. 6 merely gives emphasis to the fact that, if the negligence or incompetency of the man operating the engine was the sole cause of the accident, then Wilson should be exonerated. No. 9 means the same thing.

But the principal contention arises over the refusal of the trial court to grant Wilson's motion for a nonsuit. It is suggested that the evidence fails to disclose any negligence on the part of Wilson. It does appear that Wilson had spared neither pains nor money to keep the shaft open. He says that he had done all that could be done, except to close down the mine and retimber the shaft. But this conclusion of his is hardly justified by the evidence. There were other shafts adjoining the "Chippie" shaft, and in which the trouble did not appear, or, if it appeared at all, to a much less degree, and, these shafts being accessible one from the other at the different stations, men could have been lowered through one of the other shafts and brought up to the place of work through the "Chippie" shaft, as it appears that the cage would not stick in its ascent. But, even if the closing of the mine was a last recourse, we are not prepared to say that it was not Wilson's duty to resort to it, rather than to invite this man to work in a known place of danger. The question whether Wilson exercised reasonable care to provide a reasonably safe place for the man to work was fairly submitted to the jury.

It is suggested, also, that, if the negligence or incompetency of Greenleaf was the cause of the injury, Wilson cannot be held liable therefor, since Greenleaf was not the servant of Wilson, but was the servant of the Hypocka Company. We agree with this, and it appears to us that the trial court also adopted that theory, and gave emphasis to it in instruction No. 6 above. But

the fact that the negligence of Greenleaf may have contributed to the injury does not profit Wilson if his negligence was a concurring cause. We think the jury must have reached the conclusion that the combined negligence of Wilson in maintaining the shaft and permitting its use under the circumstances as shown in this case, and of Greenleaf in lowering the cage, was the proximate cause of the injury.

But it is further suggested that, at most, Wilson was guilty of nonaction or omission of duty in failing to have the shaft in working order, or in not forbidding its use to men not acquainted with its character, and that such omission or nonaction amounts only to nonfeasance, for which he is not liable to a third person, but, if liable at all, he is only liable to the Hypocka Company, his principal, and that the maxim *respondeat superior* applies. If Wilson's misconduct in permitting the shaft to be out of repair and in permitting its use while in such condition amounts only to nonfeasance, then the contention of his counsel may be well founded. But we are not able to agree with them in their conclusion. Some of the cases cited by counsel for appellant seem to bear out their theory and to justify the conclusion they reach. The courts and text-writers have not always been accurate in defining the terms "nonfeasance" and "misfeasance," or in discriminating between them. As applied in cases of this character, we think the term "nonfeasance" refers to the omission on the part of the agent to perform a duty which he owes to his principal by virtue of the relationship existing between them; but, whenever the omission on the part of the agent consists of his failure to perform a duty which he owes to third persons, then, as to such third persons, his omission amounts to "misfeasance," for which he is responsible. We think this conclusion is based upon reason and authority.

Mechem in his work on Agency says: "Some confusion has crept into certain cases from a failure to observe clearly the distinction between nonfeasance and misfeasance. As has been seen, the agent is not liable to strangers for injuries sustained by them because he did not undertake the performance of some

duty which he owed to his principal and imposed upon him by his relation, which is nonfeasance. Misfeasance may involve, also, to some extent the idea of not doing, as where the agent while engaged in the performance of his undertaking does not do something which it was his duty to do under the circumstances, does not take that precaution, does not exercise that care, which a due regard for the rights of others requires. All this is not doing, but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation." (Section 572.) The supreme court of Michigan in *Ellis* v. *McNaughton,* 76 Mich. 237, 15 Am. St. Rep. 308, 42 N. W. 1113, refers to and approves the language used by Mechem quoted above.

In 1 American and English Encyclopedia of Law, second edition, 1132, it is said: "Where the injury results * * * from such an omission of duty or act of negligence on the part of the agent as partakes of the character of a misfeasance, the agent is personally liable to third persons; the actual perpetrator of the positive wrong not being permitted to relieve himself from liability by showing that the wrong was done while he was acting in the course of his employment as agent for another." And, as an instance wherein nonaction or negligence was held to amount to misfeasance, the writer of the text cites the case of *Baird* v. *Shipman,* 132 Ill. 16, 22 Am. St. Rep. 504, 23 N. E. 384, 7 L. R. A. 128. In that case it appears that one Goodman, a resident of Hartford, owned land in Chicago with a house and barn situated thereon. The appellants, real estate agents in Chicago, were Goodman's agents, and as such had control of his property there. The property was leased to a Mrs. Wheeler, and at that time a large door to the barn was in a very insecure condition, which fact was known to the agents, who agreed to have it repaired, but failed to do so. An expressman seeking to deliver goods on the premises was killed by the barn door falling

upon him. His personal representative brought the action to recover damages from the agents. They contended, as does Wilson here, that their omission amounted only to a nonfeasance, for which they were responsible to their principal only; but the court took a different view, and, among other things, said: "An agent is liable to his principal only for mere breach of his contract with his principal. He must have due regard to the rights and safety of third persons. He cannot in all cases find shelter behind his principal. If, in the course of his agency, he is intrusted with the operation of a dangerous machine, to guard himself from personal liability he must use proper care in its management and supervision, so that others in the use of ordinary care will not suffer in life, limb, or property. (*Suydam* v. *Moore*, 8 Barb. (N. Y.) 358; *Phelps* v. *Wait*, 30 N. Y. 78.) It is not his contract with the principal which exposes him to or protects him from liability to third persons, but his common-law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency, nor can its breach be excused by a plea that his principal is chargeable. (*Delaney* v. *Rochereau & Co.*, 34 La. Ann. 1123, 44 Am. Rep. 456.)" After referring to the rule as stated by Mechem and Wharton, the opinion proceeds: "The rule, whether as stated by Mechem or Wharton, is sufficient to charge appellants with damages under the circumstances disclosed in this record. They had the same control of the premises in question as the owner would have had if he had resided in Chicago and attended to his own leasing and repairing. In that respect appellants remained in control of the premises until the door fell upon the deceased. There was no interruption of the causal relation between them and the injured man. They were in fact, for the time being, substituted in the place of the owner, so far as the control and management of the property was concerned. * * * When appellants rented the premises to Mrs. Wheeler in the dangerous condition shown by the evidence, they voluntarily set in motion an agency which, in the ordinary and natural

course of events, would expose persons entering the barn to personal injury. Use of the barn for the purpose for which it was used when the deceased came to his death was one of its ordinary and appropriate uses, and might, by ordinary foresight, have been anticipated." This case is cited and the doctrine announced approved in *Mayer* v. *Thompson-Hutchinson Bldg. Co.*, 104 Ala. 611, 53 Am. St. Rep. 88, 16 South. 620, 28 L. R. A. 433.

Did Wilson in fact owe a duty to Hagerty? In *Cameron* v. *Kenyon-Connell Com. Co.*, 22 Mont. 312, 74 Am. St. Rep. 602, 56 Pac. 358, 44 L. R. A. 508, it is said: "Because directors are themselves agents it is none the less true that they owe a common-law duty to third persons. If they violate that duty, they are responsible, whether the violation is the result of a wrongful omission or commission. * * * Relationship of contract to a corporation neither adds to nor subtracts from a man's duty to strangers to so use his own property, or that under his control, as not to injure another." The record in this case would seem to justify the same statement as that contained in the opinion of the Illinois court above: That Wilson had the same control at the Minnie Healy mine, so far as the management was concerned, as the owner, the Hypocka Company, would have had if it had been a natural person residing here and attending to the management himself.

In harmony with the declaration of this court in the *Cameron Case* above is the doctrine announced by the supreme court of Massachusetts in *Osborne* v. *Morgan*, 130 Mass. 102, 39 Am. Rep. 437, where, after considering and overruling a former decision of the same court, it is said: "The principal reason assigned was that no misfeasance or positive act of wrong was charged, and that for nonfeasance, which was merely negligence in the performance of a duty arising from an express or implied contract with his principal or employer, an agent or servant was responsible to him only, and not to any third person. It is often said in the books that an agent is responsible to third persons for misfeasance only, and not for nonfeasance. And it is doubt-

less true that if an agent never does anything toward carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But, if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing; but it is misfeasance, doing improperly." And to the same general effect is *Breen* v. *Field,* 157 Mass. 277, 31 N. E. 1075.

In *Campbell* v. *Portland Sugar Co.,* 62 Me. 552, 16 Am. Rep. 503, the court said: "It is the actual personal negligence of the agents which constitutes the constructive negligence of the corporation. The corporation acts through and by them, and they act for the corporation, and, when their acts or neglects result in injury to third parties, they are equally responsible with their principals."

The supreme court of Georgia in *Southern Ry. Co.* v. *Reynolds,* 126 Ga. 657, 55 S. E. 1039, announced the same rule in the following language: "When once an agent enters upon the performance of his contract with his principal, and, in doing so, omits or fails to take reasonable care in the commission of some act which he should do in its performance, whereby some third person is injured, he is responsible therefor to the same extent as if he had committed the wrong in his own behalf."

In *Ellis* v. *Southern Ry. Co.,* 72 S. C. 465, 52 S. E. 228, 2 L. R. A., n. s., 378, the supreme court of South Carolina, after an extended review of the authorities, said: "The true rule deducible from the authorities is that the servant is personally liable to third persons when his wrongful act is the direct and proximate cause of the injury, whether such wrongful act be one of nonfeasance or misfeasance." In *Lough* v. *John Davis & Co.,*

30 Wash. 204, 94 Am. St. Rep. 848, 70 Pac. 491, 59 L. R. A. 802, the same conclusion is reached by the supreme court of Washington.

In *Southern Ry. Co.* v. *Grizzle*, 124 Ga. 735, 110 Am. St. Rep. 191, 53 S. E. 244, the court said: "Where an agent fails to use reasonable care or diligence in the performance of his duty, he will be personally responsible to a third person who is injured by such misfeasance. The agent's liability in such cases is not based upon the ground of his agency, but upon the ground that he is a wrongdoer, and as such he is responsible for any injury he may cause. When once he enters upon the performance of his contract with his principal, and in doing so omits or fails to take reasonable care in the commission of some act which he should do in its performance, whereby some third person is injured, he is responsible therefor to the same extent as if he had committed the wrong in his own behalf. (See 2 Clark & Skyles on Agency, 1297 et seq.) Misfeasance may involve also to some extent the idea of not doing, as where an agent engaged in the performance of his undertaking does not do something which it is his duty to do under the circumstances, or does not take that precaution or does not exercise that care which a due regard to the rights of others requires. All this is not doing, but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation."

In 1 Jaggard on Torts, 289, the author, after referring to the conflicting decisions upon this subject, says: "The futility of such reasoning on the word 'nonfeasance' appears fully from the lack of definiteness of the meaning to be given the term. This solemn legal jugglery with words will probably disappear if the nature of the duty incumbent upon the servant be considered. If the servant owe a duty to third persons derived from instrumentality likely to harm or otherwise, and he violates that duty, he is responsible. His responsibility rests on

his wrongdoing, not on the positive or negative character of his conduct. A wrongful omission is as actionable as a wrongful commission."

Finally, it is earnestly contended that the negligence or incompetency of Greenleaf was the active and efficient cause of the injury, and that but for such negligence or incompetency the injury would not have occurred, even conceding that Wilson was negligent in permitting the shaft to remain out of order, and in permitting its use while in such condition; or, in other words, that Wilson's negligence was not a proximate cause of the injury. But we cannot concede that the mere fact that a skillful engineer, acquainted with the habits of this shaft, who knew that the cage was likely to stick and was constantly on the lookout for such an occurrence, could have stopped the engine in time to prevent the cable from running into the cage, does as a matter of law stamp the act of Greenleaf as one which broke the chain of causation between Wilson's prior negligence and Hagerty's injury, or insulated Wilson's negligence from the plaintiff's hurt, and thereby discharged him (Wilson) from all liability therefor. We think that the question whether Wilson's negligence was a proximate cause of the injury was one of fact, which was properly submitted to the jury.

We find no error in the record. The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

JOHNSON, RESPONDENT, v. GALLATIN VALLEY MILLING CO., APPELLANT.

(No. 2,561.)

(Submitted November 27, 1908. Decided January 2, 1909.)

[98 Pac. 883.]

Accounts Stated—Reopening—Presumptions—Burden of Proof—Evidence—Waiver.

Account Stated—What Constitutes.

1. The result of an ascertainment of a balance due one of two parties, and its discharge by payment, was an account stated.

Same—Estoppel—Presumptions.

2. A settlement of accounts between two parties does not create an estoppel, but furnishes a strong *prima facie* presumption that the result thus reached is correct.

Same—Complaint—Burden of Proof.

3. One who seeks to avoid a settlement of accounts, the result of which was an account stated, and open up to investigation the antecedent dealings between the parties, must allege the error, fraud or mistake on which he relies, and the burden of establishing such allegation by clear and satisfactory evidence is upon him.

Same—Knowledge of Error or Mistake at Time of Settlement—Effect.

4. If, at the time of stating an account and making a settlement, the party who thereafter seeks to avoid it, knew of the error, mistake or fraud upon which he relies, or, with ample means of knowledge at hand, failed to take advantage of such means of knowledge, the account will not be reopened except upon proof of fraud or imposition.

Same—Evidence—Review.

5. Evidence examined, and *held*, that plaintiff, who sought to surcharge an account stated, failed to meet the burden of proving error or mistake in the settlement of the account.

Same—Waiver.

6. Where plaintiff, having delivered a large quantity of grain to defendant milling company, agreed to a settlement of accounts between himself and defendant, and receipted the account with full knowledge that he had reason to believe that owing to an alleged defect in defendant's scales the latter received more grain than the scales indicated, and there was not any evidence that he had been misled by defendant's agent, he will be held to have waived any claim to a reopening of the account on the ground of error or mistake.

Appeal from District Court, Gallatin County; E. K. Cheadle, Judge.

ACTION by Joseph Johnson against the Gallatin Valley Milling Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed and remanded.

Messrs. Hartman & Hartman, and *Mr. H. M. Stewart,* for Appellant.

An account stated will not be disturbed when the party seeking to impeach or surcharge it for errors was aware of the facts constituting the errors at the time of the stating of the account. (*Linville* v. *State,* 130 Ind. 210, 29 N. E. 1129, 1130; *Everingham* v. *Halsey,* 108 Iowa, 709, 78 N. W. 220; *Harley* v. *Eleventh Ward Bank,* 76 N. Y. 618; *Auzerais* v. *Naglee,* 74 Cal. 60, 17 Pac. 371; *Allen-West Commission Co.* v. *Patillo,* 90 Fed. 628, 33 C. C. A. 194; *Turner* v. *Pearson,* 93 Ga. 515, 21 S. E. 104; *Audleur* v. *Kuffel,* 71 Ind. 543.) Where charges are made and voluntarily paid in a settlement and statement of an account with knowledge of the facts, they cannot be recovered back. (1 Cyc. 461; *Fuller* v. *Crittenden,* 9 Conn. 401, 23 Am. Dec. 364.) The power to open accounts which have been settled is exercised with much caution, and with due regard to the security of business transactions between the parties *sui juris,* when no confidential relation exists. It will be done only upon clear and convincing proof of the grounds justifying it, especially in the absence of fraud and where the ground of relief is mistake. (1 Cyc. 463, 464; *Conlin* v. *Carter,* 93 Ill. 536; *Wilde* v. *Jenkins,* 4 Paige, 481; *Case* v. *Fish,* 58 Wis. 56, 15 N. W. 808.) A settlement of an account once deliberately made is not to be opened except upon the clearest and most positive proof of fraud or mistake therein. (*Murphy* v. *Ross,* 7 N. Y. St. Rep. 182; *Case* v. *Fish,* 58 Wis. 56, 15 N. W. 808; *Moscowitz* v. *Lemp* (Ark.), 12 S. W. 781.) Where the balance on an account stated has been paid, it requires stronger evidence to overcome the settlement than where it has simply been agreed to. (*Nolte* v. *Leary,* 1 Mo. App. 598; see, also, *Dickerson* v. *Thomas,* 67 Miss. 777, 7 South. 503.)

Messrs. Walrath & Patten, for Respondent.

It is now uniformly held that the stating of an account does not create an estoppel; that it establishes *prima facie* only the correctness of the account—is merely an admission of its cor-

rectness; and that, unless there be circumstances outside the settlement of the account which would constitute an estoppel *in pais*, the account may be opened and restated where fraud, mistake or error is shown. The party seeking to open the account has no more than the burden of proving the fraud, mistake or error alleged. (1 Cyc. 451; see, also, *Gillett* v. *Chavez*, 12 N. M. 353, 78 Pac. 73; *Union Electric L. & R. Co.* v. *Surgical Supply Co.*, 122 Mo. App. 631, 99 S. W. 804; *Withers* v. *Sandlin*, 44 Fla. 253, 32 South. 829; *Chappedelaine* v. *Dechenaux*, 4 Cranch, 306, 28 L. Ed. 629; *Kennedy* v. *Goodman*, 14 Neb. 585, 16 N. W. 834; *Lawler* v. *Jennings*, 18 Utah, 35, 55 Pac. 60; *Ware* v. *Manning*, 86 Ala. 238, 5 South. 682; *Peoples* v. *Yates*, 88 Miss. 289, 40 South. 996; *Wharton* v. *Anderson*, 28 Minn. 301, 9 N. W. 860; *McKinster* v. *Hitchcock*, 19 Neb. 100, 26 N. W. 705; *Samson* v. *Freedman*, 102 N. Y. 699, 7 N. E. 419; *Conville* v. *Shook*, 144 N. Y. 686, 39 N. E. 405; *Smith* v. *Allmon*, 74 S. C. 502, 54 S. E. 1014; *Daytona Bridge Co.* v. *Bond*, 47 Fla. 136, 36 South. 445.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

In this action the plaintiff seeks to surcharge an account stated between himself and defendant and to recover an additional amount thereon, after payment and discharge of the balance found, for error and mistake not known to the plaintiff at the time of the settlement and receipt of payment. The transaction out of which the controversy grew may be stated briefly as follows: During the year 1906, the plaintiff entered into a written contract with the defendant to sell and deliver to it his entire crop of spring club wheat raised during that year, except a sufficient amount retained for seed for the following year, at the price of fifty-two cents per bushel. The plaintiff began to make delivery on November 5 and completed it on December 5. Upon the delivery of each lot it was weighed by the defendant's agent in the presence of plaintiff or his teamster, triplicate scale tickets or receipts showing the weight being made out, one for plaintiff, and the others for use by defendant in keeping

its accounts. When the last delivery was made, the plaintiff presented to the manager of the defendant his receipts and demanded payment of the amount due. On comparison of these with the copies retained by the defendant, they agreed with them in stating the number of bushels delivered and credited to the plaintiff on defendant's books. The plaintiff having in the meantime had advances of money and merchandise from defendant to the amount of $849, this amount was deducted from the total sum due, and plaintiff received defendant's check for the balance and receipted the account in full. The receipts showed a delivery of 2,603½ bushels in all, and assuming the weights to be correct the check, which was for $504.82 represented the correct balance due. The statement rendered and receipted at the time is as follows:

"Belgrade, Mont. Dec. 5, 1906.

Mr. Joe Johnson

Check No. 2597

Voucher No. "

Invoice Date	Description	
13 01 50	2,603½ bu. Sp. Club 52c	$1,353.82
52 06		
	Less contra ac	849.00
	Check	504.82

Charge J. J.
Correct D. R. F.

Received of Gallatin Valley Milling Co. Five hundred four & 82-100 Dollars, in full payment for above account.
Dated Dec. 5, 1906. JOS. JOHNSON."

It is alleged as the ground of the action: That the amount shown by the receipts to have been delivered was incorrect and erroneous, in that in fact plaintiff had actually delivered 3,463, instead of 2,603½, bushels, and that therefore there was a shortage, to the disadvantage of plaintiff, of 859½ bushels by error in defendant's account; that this error was due to the "defective, false and erroneous weighing of said grain by defendant and its agents," and resulted in showing a balance of $504.82 due plaintiff, instead of $951.76, the correct balance; and that the error was not discovered by plaintiff until in March, 1907, whereupon he, through his attorneys, pointed it out to the defendant and requested it to make the correction and pay to plaintiff the amount still due, and that the request was denied. Judgment is demanded for $446.94.

Defendant's answer puts in issue all the allegations of the complaint as to error or mistake by defendant in the weighing of the various lots delivered. It then sets forth as a special affirmative defense all the facts showing the sale and delivery as stated in the complaint, and alleges that upon the completion of the delivery plaintiff demanded a settlement of the account, and that a settlement was had, the balance ascertained, and payment made thereof; the plaintiff then and there, with full knowledge of the facts and of the condition of the account, receipting in full for such payment. The replication denies knowledge of the conditions as they actually existed at the date of the settlement.

The court found: That the gross amount of the crop was 3,710 bushels; that plaintiff delivered to defendant 3,331 bushels, being the gross crop less the amount retained for seed, fixed at 267 bushels, and 112 bushels deducted for shrinkage in weight from drying and cleaning; that plaintiff at the time of the settlement, on December 5, 1906, was entitled to credit for this number of bushels at fifty-two cents, the contract price, making the correct balance due him, after deducting $849 for advances, $883.30; that the error in the account resulting in credit to the plaintiff of 2,603½, instead of 3,331 bushels, was due to the "defective, false, and erroneous weighing of said grain by defendant and its agents" during the time of delivery; that at the time of the settlement plaintiff was ignorant of the facts and did not discover them until after he had receipted the account in full; and that, as soon as he did discover the error, he made demand upon defendant for its correction, but the request was denied. Judgment was rendered and entered for plaintiff for the sum of $378.30, with interest at the legal rate from December 5, 1906. Defendant has appealed from the judgment and an order denying its motion for a new trial.

Counsel contend that the judgment and order should be reversed, because the evidence is insufficient to sustain the findings, (1) in that it does not appear therefrom that there was error or mistake in the weights shown by defendant's account, and (2)

in that, even if such were the case, it appears that the plaintiff agreed to the account, accepted the balance shown by it, and receipted for it with full knowledge of any error made by defendant and of the facts and circumstances upon which he now relies to establish his right to recover.

A definition of what constitutes an "account stated" is not necessary to a decision of the questions here presented. It is alleged by plaintiff, and admitted by defendant, that the result of the meeting between them on December 5, 1906, was an ascertainment of the balance due from defendant upon a statement of their accounts and its discharge thereof by payment. We think, however, that the result was an account stated, within the rule of the decisions of this court in *Martin* v. *Heinze*, 31 Mont. 68, 77 Pac. 427, *Noyes* v. *Young*, 32 Mont. 226, 79 Pac. 1063, and *Dorais* v. *Doll*, 33 Mont. 314, 83 Pac. 884, as well as within the general definition laid down in 1 Cyc., at page 364, as follows: "In general terms, where an account is rendered by one person to another, showing a balance due from the one to the other, and the indebtedness thus expressed is acknowledged to be due by the person against whom the balance appears, or where parties having previous transactions agree upon a definite balance as due from one to the other, this will constitute an account stated."

The rules of law applicable to such cases as the present, wherein one of the parties seeks to avoid the settlement and reopen the account, are simple and of easy application. The balance ascertained from a statement of accounts was formerly held to be the result of so deliberate an act by the parties as to preclude an examination into the items for the purpose of correcting errors or mistakes; but this rule has been so far relaxed that, while the promise to pay the ascertained balance is in effect a new promise, the settlement being regarded as the consideration for it, the settlement does not create an estoppel, but furnishes a strong *prima facie* presumption that the result is correct. (*Martin* v. *Heinze, supra;* 1 Cyc. 451; *Holmes* v. *De Camp*, 1 Johns. (N. Y.) 34, 3 Am. Dec. 293; *Gillett* v. *Chavez*, 12 N. M. 353, 78 Pac. 68; *Ware* v. *Manning*, 86 Ala. 238, 5 South. 682;

Harman & Crockett v. *Maddy Bros.*, 57 W. Va. 66, 49 S. E. 1009; *Langdon* v. *Roane's Admr.*, 6 Ala. 518, 41 Am. Dec. 60; *Hendy* v. *March*, 75 Cal. 566, 17 Pac. 702; *Sutphen* v. *Cushman*, 35 Ill. 186.) The result, however, is none the less a contract, and the burden is cast upon the party seeking to avoid it and open up to investigation the antecedent dealings between the parties, to allege in his pleadings the error, fraud or mistake on which he relies, and to establish it by clear and satisfactory evidence. In addition to the cases cited, the following are also in point: *Chappedelaine* v. *Dechenaux*, 4 Cranch, 306, 2 L. Ed. 629; *Klauber* v. *Wright*, 52 Wis. 303, 8 N. W. 893; *Auzerais* v. *Naglee*, 74 Cal. 60, 15 Pac. 371; *Cross* v. *Sacramento Sav. Bank*, 66 Cal. 462, 6 Pac. 94; *Linville* v. *State*, 130 Ind. 210, 29 N. E. 1129; *Murphy* v. *United States*, 104 U. S. 464, 26 L. Ed. 833; *Rehill* v. *McTague*, 114 Pa. 82, 60 Am. Rep. 341, 7 Atl. 224; *Conlin* v. *Carter*, 93 Ill. 536. Unless this burden is assumed and sustained by the adverse party, the settlement is conclusive.

In *Chappedelaine* v. *Dechenaux, supra*, it was said: "No practice could be more dangerous than that of opening accounts which the parties themselves have adjusted, on suggestion supported by doubtful or by only probable testimony." In *Klauber* v. *Wright*, the court, after stating that the evidence to surcharge an account should be clear and satisfactory, quoted with approval from the earlier case of *Martin* v. *Beckwith*, 4 Wis. 220, as follows: "Principle and public policy alike require that, when parties, after a full and fair opportunity of examining and deciding upon their mutual accounts, have adjusted and settled them, the settlement should be conclusive. Any other rule would be dangerous and oppressive, and often work the greatest injustice." In *Linville* v. *State*, it was said: "The law favors the settlement of business transactions by the parties, and when they have made such settlements they will be held bound thereby, in the absence of fraud, mistake or other illegality. A voluntary settlement of accounts between parties affords a presumption that all items properly chargeable at the time were included. The presumption is not conclusive, but

clear and convincing proof that such items were unintentionally omitted is necessary to sustain a subsequent claim to recover them." Indeed, the rule has application to all contracts. The party who claims that he should not be bound by his engagements may not avoid them except upon appropriate allegations setting forth the facts showing the fraud or mistake upon which he relies, and supporting his allegations by evidence sufficiently substantial and definite to overcome the *prima facie* case made against him by the admission that he made the engagements. (*Power & Bro.* v. *Turner,* 37 Mont. 521, 97 Pac. 950.) If, at the time of stating the account and making the settlement, the adverse party knew of the error, mistake or fraud upon which he relies, or, with ample means of knowledge at hand, he failed to take advantage of such means of knowledge, there is still less reason that the account should be reopened, and it will not be permitted except upon proof of fraud or imposition. (1 Cyc. 464; *Gage* v. *Parmelee,* 87 Ill. 329; *Farnam* v. *Brooks,* 9 Pick. (Mass.) 212; *Swayze* v. *Swayze,* 37 N. J. Eq. 180.)

Applying these rules to the evidence presented by the record, we are constrained to hold that it does not justify the findings of the district court. Counsel for respondent frankly stated during the argument that they did not allege or insist that the evidence established fraud on the part of the defendant. They rest their argument in support of the findings solely upon the evidence which, they insist, tends to show inaccuracy in the scales used by the defendant's agent in weighing the wheat as it was delivered. The evidence on this point is substantially the following: At the time the wheat was threshed, the machine measurement showed 3,730 bushels. Out of this the plaintiff weighed and retained 266⅔ bushels. According to his testimony, the scales used by him in weighing this amount fell a half bushel short in a hundred. After taking out 266⅔ bushels weighed in this way, he delivered the entire balance to defendant. During the delivery he concluded that something was wrong with the defendant's scales, because, judging from the rapidity at which the bulk in his bin in which the wheat had

been put when threshed was diminishing, it was not holding out as it should. In order to satisfy himself that his conjecture was well founded, he took the last lot to the county scales and had it weighed there before delivery to defendant, and, by comparison of the weights thus obtained with those shown by defendant's scales, found a difference of 1,115 pounds, the county scales showing a weight of 21,335, and the defendant's scales 20,240 pounds. The weighing at the county scales was not done by the official weigher, but by another man, who was left in charge of the scales while the former was at dinner. There is no evidence that this weighing was correctly done, nor that the man in charge understood the use of the scales. Shortly before the trial, and about one year after the settlement, one of plaintiff's witnesses took the measurement of the length and breadth of plaintiff's bin and the height at which plaintiff told him the wheat stood in the bin when put into it, and calculated the cubical contents of the included space in bushels, finding the contents to be 3,610 bushels. There was some evidence to the effect that the machine measurement referred to was reasonably accurate. Plaintiff testified, in substance, that at the time of the settlement he discussed the apparent shortage with defendant's manager and insisted that he was nearly 1,000 bushels short because of the error in defendant's weights, but that the manager insisted that such was not the fact, and that, if anything was wrong, it was in the weights gotten from the county scales. He further stated that he then made the settlement and receipted for the balance found due him, though he well knew that defendant's scales were wrong, and that he was getting pay for nearly 1,000 bushels less than he was entitled to. In explanation, offered by him, as to why he settled notwithstanding his knowledge of this fact, he said: "I did not feel like taking any action at that time." There was evidence on the part of the defendant, uncontradicted, to the effect that the scales used by it were of standard make, were in good order and weighed accurately, were tested frequently to see that they were in proper

order, and were used from day to day in the conduct of its business.

It is apparent from this evidence, we think, that the plaintiff failed to meet the burden cast upon him by the rules of law applicable. The only evidence offered of any substantial value, tending to show that he was not paid for all the wheat actually delivered after allowing for shrinkage, is the thresher measurement. The bin measurement is of little value or corroborative force, because it was not based upon actual measurement of the space filled by the wheat, but upon the measurement of two of its dimensions and plaintiff's recollection, after the expiration of a year's time, of the other. The county scale weight of the last lot delivered is of no value for purposes of comparison. Even if the weights of all the separate lots had been taken in the same way, in the absence of some evidence tending to show that they had been correctly taken, the court was left to guess as to whether or not such was the case. There was also some question as to the correctness of the machine measurement, for the scale was shown to have been out of order on a previous occasion to such an extent as to make a substantial overmeasurement, and though it appears to have been adjusted, yet, even so, owing to irregularity in the running of the machine, it would at times give overweight to a substantial degree. There was no evidence introduced tending to exclude the idea that there were not other causes of loss to the plaintiff, after making all due allowance for natural shrinkage because of moisture and from cleaning. Weighing this evidence against the evidence of the persons in charge of defendant's scales, we do not think error or mistake is made to appear with sufficient clearness to justify a reopening of the account; but, assuming that the evidence is sufficient to establish substantial error in the weights furnished by defendant's agent, the settlement was made and the account receipted with full knowledge on the part of the plaintiff of all the facts submitted at the trial. There is no evidence that he was misled by any statement made as to any of them by any of defendant's agents. Under the circumstances,

he should be held to have waived the claim which he now asserts against the defendant.

The judgment and order denying a new trial are reversed, and the cause remanded, with directions to enter judgment for defendant.

Reversed and remanded.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SMITH concur.

HILGER, RESPONDENT, *v.* SIEBEN ET AL., APPELLANTS.

(No. 2,563.)

(Submitted November 28, 1908. Decided January 4, 1909.)

[98 Pac. 881.]

Waters and Water Rights—Evidence—Insufficiency.

1. Evidence adduced by plaintiff in a suit to determine water rights, *held* insufficient to warrant a decree that plaintiff and her predecessor had appropriated a certain number of inches of water at a spring, where it did not appear when the water so appropriated was first used by such predecessor, when he dug a ditch by which it was sought to divert the water, when the water was applied for certain power purposes, or whether he did anything toward making an appropriation, other than the filing of a notice of appropriation.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by Susanna Hilger against Chris Zabel and others. From the judgment, defendants Henry Sieben and others appeal. Reversed and remanded.

Messrs. Gunn & Rasch, for Appellants.

Messrs. Walsh & Nolan, for Respondent.

The existence of a subterranean channel is sometimes determined by shrubbery on the surface (*Hall* v. *McLea,* 53 Cal. 581),

and sometimes by springs ceasing to flow. (*Kenney* v. *Carillo*, 2 N. M. 480; see, also, Wiel on Water Rights, secs. 325a, 353, 354.)

In a controversy between the appropriator of percolating waters for use on distant lands, and the owners of the lands overlying the water-bearing strata, those who have used the water on their lands before the time of appropriation have rights paramount to the rights of such appropriator. (*Katz* v. *Walkinshaw*, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236; see, also, *McClintock* v. *Hudson*, 141 Cal. 275, 74 Pac. 849; *Cohen* v. *La Canada Land & Water Co.*, 142 Cal. 437, 76 Pac. 47; *Montecito Co.* v. *Santa Barbara*, 144 Cal. 578, 77 Pac. 1113; *Newport* v. *Temescal Water Co.*, 149 Cal. 531, 87 Pac. 372, 6 L. R. A., n. s., 1098.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was commenced by the plaintiff against the defendants to have determined the relative rights of the parties to the use of the waters of Towhead creek, in Lewis and Clark county. The plaintiff is the owner of certain real estate known as the "Hilger ranch." She claims the right to the use of all the waters of the stream. In her complaint she asserts the right to this use by virtue of the appropriation of some of the waters which flow out of the canyon in which the stream rises, disappear in the gravel, and by means of a well-defined subterranean channel are conducted onto her land, where they reappear in the form of a spring; and she asserts her right to the remaining portion of the water by reason of the fact that such water percolates through the loose gravel and sand into and under the soil of her premises, thereby affecting subirrigation. The defendants deny the plaintiff's claim, and assert their rights to the use of certain quantities of the water by appropriation. The case was tried to the court without a jury. The court made findings of fact and conclusions of law, and entered a decree by which awards were made to the parties as follows: To the

plaintiff the right to the use of 100 inches of water appropriated May 1, 1873; to the defendants Sieben and Grimes the right to the use of 200 inches appropriated January 1, 1882; to the defendants Zabel and Kupfer the right to the use of 200 inches appropriated October 5, 1901. The court specifically found against the plaintiff upon her claim to the use of any of the waters by virtue of subirrigation of her land. The defendants Sieben and Grimes have appealed from the judgment, and from an order denying them a new trial.

Two questions only are presented for our determination: (1) Is the evidence sufficient to justify the finding of the trial court that the waters of Towhead creek, to the extent of 100 inches, after disappearing in the sand and gravel some distance above plaintiff's ranch, follow a well-defined subterranean channel to the ranch and reappear as a spring; and (2) is the evidence sufficient to justify the finding that on May 1, 1873, the plaintiff and her predecessors in interest appropriated the 100 inches of water thus appearing at the spring? We may dismiss the first of these questions with the observation that in our opinion the evidence is amply sufficient to warrant the finding of the trial court. The second question presented requires further consideration.

Nicholas Hilger, the husband of plaintiff, was the principal witness in her behalf. Her sons, Joseph D. and Andy Hilger, and one Ewing, also gave testimony in support of her contention. It appears that John H. Ming owned the Hilger ranch for three or four years prior to 1873, when he sold it to Nicholas Hilger, who owned it continuously until 1904, when by mesne conveyances it came into the possession of the plaintiff. Nicholas Hilger lived on the premises practically all of the time he owned them. He appears to have been thoroughly acquainted with the conditions there, and, in view of these facts, his testimony appears all the more remarkable. Aside from the effects upon the land of the percolating waters, his testimony touching the use of the waters of Towhead creek on the Hilger ranch is summarized as follows: He purchased the property in 1873,

and at that time Ming had a ditch tapping Towhead creek some distance above the ranch and conducting the water onto a portion of the land above the buildings and the spring; that *several years ago* he (Nicholas Hilger) dug a ditch capable of carrying 150 to 200 inches of water, tapping Towhead creek about three-fourths of a mile above the ranch, and conducted some of the water onto the ranch to irrigate some trees and higher ground not otherwise irrigated; that this ditch was used for *several* seasons; that they had use for the water of the spring and had ditches to conduct it onto a portion of the bottom land not naturally irrigated; that during the wet seasons the surplus water from the spring was used for power purposes to operate a pump or water-wheel to lift water from a near-by well to irrigate some ground above not otherwise irrigated. The witness then further testified: "Q. Well, now, why was it that you didn't use that upper ditch on your ranch? A. I needed the water on the ranch; by running it from there and around, I would deprive myself of water on the ranch, where I needed it on the ground. * * * Q. What was the largest quantity of water that you knew of as being developed or produced by the springs? A. Oh, we made use of it. We made use of it, almost all of it all the time. Q. What would be the greatest quantity, how many inches? A. We usually had a flow of about 200 inches. There was a box there through which it run. * * * " This witness further stated that on December 24, 1881, he filed for record a notice of appropriation of 200 inches of the water of Towhead creek. It is to be observed from this that the witness wholly fails to state when the water was first used by him, when he dug the ditch three-fourths of a mile above his place, whether he ever used the Ming ditch, when it was he constructed the ditch or ditches leading from the spring, when it was he installed the pumping apparatus, or whether in 1881 he did anything toward making an appropriation other than to file the notice of appropriation.

The witness Ewing testified that he worked on the Hilger ranch for Ming in 1872 and 1873; and with respect to the Ming

ditch he said: "I know of his constructing a ditch from Towhead gulch onto the bench during the time. He had plowed some ground up, and was farming on the bench, is the reason he dug that ditch. The reason he discontinued using that ditch was because it affected his spring at the mouth of Beverhead, the spring there by Hilger's. * * * The water was only used for one season, and the reason it was only used for one season I have already given you."

Joseph D. Hilger testified: "I don't remember exactly when the water from the spring was first used for irrigation. That goes farther back than I can remember. I think it was about '82. I think the short ditch for the purpose of taking the water from the spring for irrigating was constructed in '82. * * * That ditch was about 500 or 600 feet in length, I guess. I never measured it. I helped to construct part of the ditch. That ditch conducted the water onto a piece of land below the spring, on a garden spot. * * * Until the construction of this ditch, there was no use made of the water of the spring for irrigating down there. There may have been before. * * * There were no signs of any ditches there that had been used for conveying water from the spring when this ditch was constructed—none that I knew of or saw. * * * There are some small ditches down there traversing this Hilger ranch. I don't remember when these were dug, but I think it was about '86. One of them was dug for a drain. * * * I remember the water of the spring being used to operate a water-wheel. That water-wheel was constructed about '83 or '84. I am not positive—'82 maybe. I am not sure about that. * * * The water-wheel was operated by water from the spring several years—four, five, or six years. The water from the well that was pumped by the water-wheel was used for running around the piece of ground where the trees were planted. It was to irrigate the trees. * * * I don't remember when this well that I spoke about was filled up. It was some time after we quit using the water-wheel for power. We used the wheel in '84, '85, '86, and '87; so it must have been about '90."

Andy Hilger testified: "I saw the old ditch there, but I know in recent years of water being used; that is, we tried to use it, but it was too near dried up to do anything with it. * * * That water from the spring has been used for irrigating within the last 10 years. To my personal knowledge I know that we have used it the last three years since I have been on the ranch. We used as much of it as we could last year and the year before. We had a ditch leading from the spring, or from the channel through which the water from the spring flows. * * * The lower garden we irrigated from the spring. We have two gardens there. I irrigated the upper garden from water that I pumped out of the well on a few little tomato plants that were drying up on the ground that we always raised crops on without irrigation. I remember of the water from the spring being used to run a water-wheel. If I am not mistaken, that water-wheel was put in there in 1883. It may have been the year before; but I think it was in '83. * * * The well is not there now from which the water was taken. I couldn't say when the well was filled up. I know it was open in '83."

In awarding to the plaintiff the prior right to the use of 100 inches of the water the court specifically based its decree upon finding No. 10, as follows: "That ever since 1873 the plaintiff and her predecessors in interest have used the water of said spring to the amount of one hundred (100) inches for power purposes, and also through ditches constructed from said spring, and said water to the amount of one hundred (100) inches has been used to irrigate a portion of the lands now owned by plaintiff, and through the use of said water, in the manner aforesaid and to the extent of one hundred (100) inches, the plaintiff and her predecessors in interest appropriated of the waters of said Towhead creek the quantity named, and, as against the defendants, is entitled to the beneficial use of one hundred (100) inches of said water." Apparently, the court was unable to find that the waters from the spring had ever been used for domestic or other useful purposes, except for power and irrigation purposes, and we have simply searched the record in vain

for evidence to sustain the finding that the water was applied to those purposes in 1873. In fact, the evidence upon this question now under consideration is so barren of probative facts that we are unable to make a proper finding or suggest a modification of the decree which would secure to the parties their rights, and for this reason the judgment and order are reversed and the cause is remanded to the district court, with directions to grant a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE SMITH, being disqualified, takes no part in the foregoing decision.

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LONGPRE, RESPONDENT, *v.* BIG BLACKFOOT MILLING COMPANY, APPELLANT.

(No. 2,549.)

(Submitted December 14, 1908. Decided January 11, 1909.)

[99 Pac. 131.]

Personal Injuries—Master and Servant—Defective Appliances—Duty to Inspect—Instructions—Pleadings—Defenses—Assumption of Risk—Negligence of Fellow-servant.

Personal Injuries—Assumption of Risk—Pleadings.

1. In order to make the defense of assumption of risk available to defendant in a personal injury action, it must be specially pleaded.

Same—Master and Servant—Negligence of Fellow-servant—Pleadings.

2. The defense that the injury complained of by a servant was the result of the negligence of a fellow-servant, being of the same nature as that of assumption of risk, must also be specially pleaded before defendant master can avail himself of it.

Same.

3. The rule that the defense of negligence of a fellow-servant must be specially pleaded is subject to the same limitations as that of assumption of risk and contributory negligence, to-wit, that, if the facts alleged in the complaint show that the servant is at fault, the pleading is demurrable, and also that, if the facts proven by plaintiff at the trial raise a presumption of contributory negligence on his part, he may be nonsuited, whether the defense is pleaded or not.

Same—Contributory Negligence—Conflicting Evidence—Question for Jury.

4. Where, in an action by a laborer for damages for personal injuries alleged to have been suffered by reason of the breaking of the stock of a cant-hook, used to move logs, the evidence was conflicting as to whether plaintiff was guilty of contributory negligence in subjecting the appliance to unusual or unnecessary strain, the question was properly submitted to the jury.

Same—Master and Servant—Appliances—Duty to Inspect—Question for Jury.

5. While it is the duty of the master, after having provided the servant with reasonably safe and suitable appliances with which to work, to inspect them both at the time of furnishing them and during the course of the employment to discover defects in them, such duty of inspection is not absolute; it does not require him to inspect appliances, simple in construction, which do not in themselves involve the element of danger; hence, an instruction that defendant was absolutely bound to inspect or cause to be inspected a cant-hook, used for moving logs, before it was delivered to plaintiff for use, was erroneous. The question whether it was defendant's duty to inspect it was for the jury to determine.

Instructions—Refusal—When not Error.

6. Refusal of a requested instruction fully covered by those given is proper.

Appeal from District Court, Missoula County; F. C. Webster, Judge.

ACTION by Philip Longpre against the Big Blackfoot Milling Company. From a judgment for plaintiff, and from an order denying it a new trial, defendant appeals. Reversed, and new trial ordered.

Messrs. Marshall & Stiff, for Appellant.

In a case of this character the burden is on the plaintiff to show that the tool or appliance by which he was injured was not only defective, but was that character of tool which called for inspection, and care and prudence beyond that of purchasing the best in the market, of the best material and made by the best manufacturer. The mere fact that the accident happened because of defective appliances or tools cannot be taken as evidence of the defendant's negligence. (20 Am. & Eng. Ency. of Law, 86, 87.) It is incumbent on him to show affirmatively all the elements of a right to recover; in other words, to prove all the facts which constitute or make apparent the alleged negligence of the master, and that it was the proximate cause of

the injury. (Labatt on Master and Servant, sec. 832; *State ex rel. Hamelin* v. *Malster*, 57 Md. 287; *Atchison etc. R. R. Co.* v. *Ledbetter*, 34 Kan. 326, 8 Pac. 411; see, also, *Patton* v. *Texas & Pac. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Stearns* v. *Ontario Spinning Co.*, 184 Pa. 523, 63 Am. St. Rep. 807, 39 Atl. 292, 39 L. R. A. 842; *Kincaid* v. *Oregon Short Line R. Co.*, 22 Or. 35, 29 Pac. 3.)

That the injury was caused by the negligence of a fellow-servant does not have to be pleaded to be available as a defense. (*Pennsylvania* v. *Fishback*, 123 Fed. 472, 59 C. C. A. 269; *Goodwell* v. *Montana Central Ry. Co.*, 18 Mont. 293, 45 Pac. 210; *Wastl* v. *Montana Union Ry. Co.*, 24 Mont. 161, 61 Pac. 9.)

"The employer is liable to the servant for negligence of a fellow-servant only when the employer's own negligence contributes to the injury, or when the other servant occupies such a relation to the injured party or to his employment in the course of which his injury was received as to make the negligence of such servant the negligence of the employer." (2 Labatt on Master and Servant, sec. 470.)

Messrs. Hall & Patterson, for Respondent.

The defendant having set up the defense of contributory negligence and not the defense of assumed risk, the only conclusion that could be reached is that the defendant did not rely upon and waived the latter defense.

The defense that plaintiff was injured through the negligence of a fellow-servant must be specially pleaded. (6 Thompson on Negligence, sec. 7625; *Layng* v. *Mt. Shasta Min. Spgs. Co.*, 135 Cal. 141, 67 Pac. 48; *Higgins* v. *Missouri Pacific Co.*, 43 Mo. App. 547.) As to the liability of the master for an injury to a servant, caused by the negligence of another employee, see *Mast* v. *Kern*, 34 Or. 247, 75 Am. St. Rep. 580, 54 Pac. 951; *Northern Pac. Ry. Co.* v. *Herbert*, 116 U. S. 647, 6 Sup. Ct. 590, 29 L. Ed. 755.

The mere simplicity of a tool will not exempt the master from all care, or relieve him from liability under all circumstances; but the capacity, intelligence and experience of the servant, the character of the defects, his opportunity for detecting them, his situation and the circumstances calculated to withdraw his attention from them, as well as the fact that the servant has a right to rely upon the master to protect him from danger and injury, and in selecting the agent from which it may arise, are factors of varying importance, which must also be taken into account. (*Missouri K. & T. Ry. Co.* v. *Quinlan* (Kan.), 93 Pac. 633; *Southern Kansas R. Co.* v. *Croker*, 41 Kan. 747, 13 Am. St. Rep. 320, 21 Pac. 785; *Chicago K. & W. R. Co.* v. *Blevins*, 46 Kan. 370, 26 Pac. 687; *Louisville & N. R. Co.* v. *Roberts*, 24 Ky. Law Rep. 1160, 70 S. W. 833; *Baltimore & Ohio etc. R. Co.* v. *Amos*, 20 Ind. App. 378, 49 N. E. 854; *Vant Hul* v. *Great Northern R. Co.*, 90 Minn. 329, 96 N. W. 789; *Johnson* v. *Missouri Pac. R. Co.*, 96 Mo. 340, 9 Am. St. Rep. 351, 9 S. W. 790; *Deckerd* v. *Wabash R. Co.*, 111 Mo. App. 117, 85 S. W. 982; *Missouri Pac. Co.* v. *Speed*, 3 Tex. Civ. App. 454, 22 S. W. 527; *De La Vergne R. Mach. Co.* v. *Stahl*, 24 Tex. Civ. App. 471, 60 S. W. 319.)

Even though a fellow-servant is guilty of negligence contributing to the injury, if the negligence of the master also concurs to cause the injury, the master is liable. (2 Labatt on Master and Servant, sec. 814; *Stringham* v. *Stewart*, 100 N. Y. 516, 3 N. E. 575; *Grand Trunk R. Co.* v. *Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; *Maupin* v. *Texas & P. R. Co.*, 99 Fed. 49, 40 C. C. A. 234; *Atchison, T. & S. F. R. Co.* v. *Lannigan*, 56 Kan. 109, 42 Pac. 343; *Northern Pac. Ry. Co.* v. *Poirier*, 67 Fed. 881, 15 C. C. A. 52; *Baltimore & Ohio R. Co.* v. *McKenzie*, 81 Va. 71; *Illinois C. R. Co.* v. *Swisher*, 61 Ill. App. 611; *Mexican Nat. R. Co.* v. *Musette*, 7 Tex. Civ. App. 169, 24 S. W. 520; *Noble* v. *Bessemer S. S. Co.*, 127 Mich. 103, 89 Am. St. Rep. 461, 86 N. W. 520, 45 L. R. A. 456; *Schwarzschild & Sulzberger Co.* v. *Weeks*, 72 Kan. 190, 83 Pac. 406, 4 L. R. A., n. s., 515.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The plaintiff was in the employ of defendant in its logging camp as a common laborer. He was required in the course of his work to assist in handling and moving logs to get them in readiness for transportation to defendant's mill. For this purpose he and his coemployees used cant-hooks furnished by defendant. It frequently happened that the wooden stocks or levers of these implements would be broken, and it became necessary to have them replaced by new ones. The new stocks were also furnished by the defendant, and the fitting was done at the blacksmithshop of defendant, usually by the blacksmith's helper, who was also a "woodworker." The defendant kept on hand in its warehouse a supply of these stocks in unbroken bundles or crates, just as they were received from the manufacturer. From time to time, as necessity required, the blacksmith or his helper would obtain the key to the warehouse from defendant's manager or purchasing agent and would take out a crate for use. On or about October 18, 1905, the plaintiff left the cant-hook used by him at the shop to be fitted with a new stock. On going to work on the following morning, the implement was returned to him by the helper, the latter having in the meantime fitted it with a new stock. During the afternoon of the same day, while plaintiff was using it to move a log along a skidway to logging trucks, the stock broke, precipitating him onto the skidway, with the result that he had his leg broken below the knee, and was otherwise bruised and hurt. Hence this action for damages. The ground of recovery alleged in the complaint is that the cant-hook furnished to plaintiff was defective, in that the new stock with which it had been fitted was unsound, insufficient, and unsafe; that of this fact the defendant had knowledge, or, by the exercise of ordinary care, should have had knowledge; that the condition of the cant-hook was not known to the plaintiff; and that, therefore, the defendant, through its negligence in this behalf, failed to use ordinary care

to furnish the plaintiff a reasonably safe appliance with which to do his work.

The answer denies all the allegations contained in the complaint, except the corporate capacity of the defendant, and that the plaintiff was in its employ as alleged. It is then alleged that, if the plaintiff received the injury complained of, it was the result of his own contributory negligence. Upon this allegation there was issue by reply. The trial resulted in a verdict for plaintiff for $800. From the judgment entered thereon, and from an order denying it a new trial, the defendant has appealed. It makes the contention that the evidence is insufficient to justify the verdict, and that the court erred to its prejudice in its rulings upon questions of evidence and in instructing the jury.

It is insisted that the evidence shows conclusively that the defect in the stock of the cant-hook was open and obvious to any person making reasonable use of his senses, and that, for this reason, the verdict of the jury should have been in favor of the defendant, because there was a clear assumption of risk of any danger resulting from its use by the plaintiff. It is sufficient answer to this contention to say that this issue was nowhere made in the pleadings. According to the current of authority, the defense of assumption of risk is affirmative in character, and must be pleaded specially before it can be availed of by the defendant. (*Coulter* v. *Union Laundry Co.*, 34 Mont. 590, 87 Pac. 973; *Nord* v. *Boston & Mont. Con. C. & S. Min. Co.*, 33 Mont. 464, 84 Pac. 1116, 89 Pac. 647; 1 Thompson on Negligence, sec. 368; 6 Thompson on Negligence, sec. 7625; 20 Cyc. 133.)

A like contention is made that the evidence conclusively shows that the injury was the result of the negligence of the helper, a fellow-servant. This defense is of the same nature as that of assumption of risk. It is based upon the principle that one entering upon the service of another assumes the ordinary risks of the employment, among which is included the risk of injuries caused by the negligence of fellow-servants. (*Goodwell*

v. *Montana Central Ry. Co.*, 18 Mont. 293, 45 Pac. 210; *Mielke* v. *Chicago etc. Ry. Co.*, 103 Wis. 1, 74 Am. St. Rep. 834, 79 N. W. 22; *Baltimore & Ohio R. R. Co.* v. *Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772.) It must logically follow, then, that in those jurisdictions, as in Montana, where the rule has been adopted that the defenses of contributory negligence and assumption of risk must be availed of, if at all, by special allegation, the defendant must in like manner avail himself of the defense that the negligence charged was that of a fellow-servant. (*Duff* v. *Willamette Steel Works*, 45 Or. 479, 78 Pac. 363, 668; *East Tennessee & Pac. Ry. Co.* v. *Collins*, 85 Tenn. 227, 1 S. W. 883; *Layng* v. *Mt. Shasta Mineral Springs Co.*, 135 Cal. 141, 67 Pac. 48; *Ell* v. *Northern Pac. Ry. Co.*, 1 N. D. 336, 26 Am. St. Rep. 621, 48 N. W. 222, 12 L. R. A. 97; *Norfolk etc. R. R. Co.* v. *Houchins*, 95 Va. 398, 64 Am. St. Rep. 791, 28 S. E. 578, 46 L. R. A. 359.)

The general rule applicable to the defense of contributory negligence, as above stated, is subject to the limitation that, if the facts alleged in the complaint show that the servant is at fault, the pleading is open to objection by demurrer. So, also, if the facts proven by plaintiff at the trial raise a presumption of contributory negligence on his part, he may be nonsuited; and this whether the defense is pleaded or not. (*Birsch* v. *Citizens' Electric Co.*, 36 Mont. 574, 93 Pac. 940, and cases cited.) By analogy, the rule requiring assumption of risk and negligence of a fellow-servant to be alleged specially is subject to the same limitation.

Without reference to the question as to how the issue of contributory negligence must be presented, to say that negligence of a fellow-servant may be proved as a defense under defendant's denials, while the assumption of the risk of other dangers must be pleaded specially as new matter, is to make an illogical and unwarranted exception in the application of the general principle that the servant upon entering the particular employment assumes all the ordinary risks incident to it. This question of pleading has never been definitely settled in this juris-

diction. In many cases, of which *Goodwell* v. *Montana Central Ry. Co., supra,* is an example, the defense has been invoked and considered, though no issue on the subject was made in the pleadings. In none of these cases, however, was the attention of the court directed to this condition of the pleadings; all of them having been submitted to this court upon the theory upon which the trial was had in the court below. No case has been called to our attention in which the subject was given attention. It was referred to in *State ex rel. Montana Central Ry. Co.* v. *District Court,* 32 Mont. 37, 79 Pac. 546, but this court refused to decide it because it was not pertinent to the matter involved. A consideration of it is pertinent to this case, because of the contention of counsel for plaintiff that, though the trial court submitted instructions authorizing the jury to find upon the issue, it was not presented by the pleadings, and therefore that the contention of defendant with reference to it cannot avail it in this court. While we think the contention of counsel for plaintiff is correct in the abstract, yet for the reason that the district court, without protest from counsel, adopted the theory that the issue was properly presented by the denials in the answer, it is proper to consider the matter so far as it presents the question of pleading. Since, however, the judgment and order must be reversed for error in the instructions, we shall not consider the contention of defendant further than to say that it was a question for the jury to determine, upon the whole of the evidence, whether it discharged its duty to plaintiff in furnishing a suitable appliance. If it did, of course, it cannot be held liable for any negligence of which the blacksmith's helper was guilty in failing to notify the plaintiff of the alleged defective condition of the cant-hook stock.

The same disposition must also be made of the contention that the evidence shows conclusively that the plaintiff was guilty of contributory negligence. There was evidence tending to show that the plaintiff in attempting to move the log upon which he was working subjected his cant-hook to unusual and unnecessary strain, and that the breaking would not have occurred but for

his negligence in this regard. Upon this point the evidence is conflicting, and was properly submitted to the jury.

Some contention is made, also, that, since the evidence shows that the defendant purchased its supply of stocks from a reputable manufacturer and as of first-class material, the presumption that it had fully performed its duty in respect of furnishing the plaintiff with a suitable appliance must obtain, and that a new trial should have been granted on that ground. As pointed out by Mr. Labatt in his work on Master and Servant (Vol. 1, sec. 153), it is the general rule that, if an appliance of an approved pattern has been obtained from a reputable maker, this fact is *prima facie* evidence that the defendant was not negligent in requiring his employee to use it. Some cases, as appears from the citations in the notes to this work, go so far as to hold this fact conclusive, and, *a fortiori,* where it appears that the appliance was submitted to thorough tests before the sale. The duty to provide for the safety of the servant is personal to the master, and cannot be delegated. Either of the rules stated by this author is open to the objection that this important duty has in each case been delegated to a stranger against whom, for any negligence of which he may have been guilty, the servant has no recourse. This result does not seem to be reasonable or just. The better rule, it seems to us, is that it is a question for the jury, under the rule laid down hereafter, to determine from the evidence submitted, including the character of the appliance and the apparent intelligence and experience of the servant, whether the master has discharged his duty. This leaves the servant some recourse in case he receives injury from a defective appliance, and at the same time does not cast an unreasonably onerous burden upon the master. Counsel are mistaken, however, in asserting what the evidence shows as to the quality of the stocks furnished by defendant. There was evidence tending to support their claim. But the helper testified that the crate of stocks out of which the one furnished to plaintiff was taken consisted of culls—that is, stocks of a third-rate quality—and that the particular one furnished was made

out of the sap of the hickory, and was worm-eaten. Thus there appears a conflict in the evidence, the proper inference from which it was the province of the jury to draw. Under these conditions, the finding of the jury and the judgment of the trial court thereon upon motion for new trial must be accepted by this court as final.

The principal contention made is that the court erred in declaring the rule in the instructions that the defendant was bound absolutely to inspect, or cause to be inspected, the stock of the cant-hook before it was delivered to plaintiff for use. For illustration, we quote paragraph No. 16 of the charge, as follows:

"The court instructs the jury that while it is the duty of the employer to provide reasonably safe, sound and suitable tools and implements with which the employee is to work, the purchase of machinery and appliances of approved quality and kind of a reputable dealer or manufacturer, and reasonable care in inspection for the purpose of discovering obvious defects, is a sufficient discharge of this duty, and the employer is not an insurer of the absolute safety of the tools and implements so furnished, nor is the employer bound to provide the newest or best possible appliances, but only such as are reasonably safe and suitable, and such as are ordinarily used in the country where the service is to be performed; and you are therefore further instructed that if you believe from the evidence in this case that the defendant purchased the cant-hook charged in the complaint to have been defective from a reputable dealer, and used reasonable care in inspection to discover obvious defects, and the same was of the quality and kind such as are ordinarily used by people engaged in the same services, then the defendant is not guilty of negligence, and the plaintiff cannot recover." In a preceding paragraph substantially the same rule is declared.

There is thus presented the question: Is the duty of inspection always present and absolutely binding upon the master, or is it a relative one to be discharged only when the particular machine or appliance furnished, or the special use to be made of it, makes such inspection necessary? The general rule is that

the master owes to his servant the duty to use ordinary care to prevent accident or injury while engaged in his service. This rule includes the requirement to use ordinary care to provide him with reasonably safe and suitable appliances in the performance of his work, reasonably competent fellow-servants, and a reasonably safe place in which to work. Having done this in the first instance, he must also use ordinary care to maintain these conditions. This is the limit of his obligation; and, having discharged it, he is not liable for any injury that may occur. Among the particular duties incumbent upon him is that of inspection of the machinery and appliances to discover defects in them, both at the time of furnishing them and during the course of the employment; for this is the only means by which he may guard the safety of those employed by him in the use of them. It is also a personal duty, and cannot be delegated to another. (26 Cyc. 1332.) But it is not always absolute. It is not the duty of a railroad company or other persons engaged in great industrial enterprises to inspect, much less to test, every tool or appliance put into the hands of an employee. This duty arises only when the appliance is of such a character that a man of ordinary prudence would, under the same circumstances, make the inspection as a precaution against injury to his servant. The master is not required to inspect simple appliances, such as hammers, saws, spades, hoes, lanterns, push sticks, and the like, the character and use of which are understood by all alike. A tool of this class is so simple in its construction and so well understood by men of ordinary intelligence that it would seem absurd to say that the master should make a careful inspection of it before he commits it to the hands of his servant, who has the same capacity to understand its character and uses that he himself has. This was held by the supreme court of Texas to be the rule with reference to a lantern furnished by a railroad company to one of its firemen for use in giving signals. In attempting to clean it, the glass was broken, and the fireman was seriously injured by having the tendons of his wrist cut. The court said: "The only negligence

charged against the plaintiff in error is that it failed to have the lantern which was furnished to the plaintiff inspected before furnishing it, or after it had been furnished, and while he was using it. Inspection is only the means by which the master exercises the care required of him for the servant's protection. It is not the duty of a railroad company to inspect every implement or tool that it furnishes to its employees, but that duty arises whenever the machinery or implement is of such character that a man of ordinary prudence would, under the same circumstances, inspect the machinery or implement as a precaution against injury to the servant. If an individual, being an ordinarily prudent man, would not have inspected the lantern before furnishing it to the servant, or after it had been furnished and while it was in use, then the railroad company was not required to do so in this case. A master is not required to inspect the common tools and appliances which are committed to the custody of the servant who has the capacity to understand their character and uses." (*Gulf C. & S. F. R. Co.* v. *Larkin*, 98 Tex. 225, 82 S. W. 1026, 1 L. R. A., n. s., 944.)

So in *Garnett* v. *Phoenix Bridge Co.* (C. C.), 98 Fed. 192, where a servant was injured through the use of a wrench furnished by the master and which proved to be defective, it was held that the master was not liable. In this connection the court remarked: "The knives of a planing machine, the saws of a sawmill, the revolving wheels of a factory, and many other mechanical devices and accessories are in their nature dangerous, and therefore the employer is justly required to adopt proper measures for the protection of those engaged in and about their operation; but the notion that the conductors of the vast industrial enterprises which distinguish our age and country are deficient in ordinary prudence if they do not take care that none of the many to whom they give employment shall be hurt through the breaking of a handsaw, a hammer, or a wrench is repugnant to common sense and defamatory of the law."

Miller v. *Erie R. Co.*, 21 App. Div. 45, 47 N. Y. Supp. 285, was an action brought by a switchman for injuries sustained by

him through the breaking of a push-pole, by which an engine on one track was enabled to push a car on an adjoining track. It was the duty of the plaintiff to put the pole in position. In attempting to move a car by this means, the pole broke, and the plaintiff was injured. A judgment in his favor was set aside. In concluding its opinion the court said: "There is no duty resting on an employer to inspect during their use those common tools and appliances with which every one is conversant. If a spade, a hoe, or push stick either wears out or becomes defective, the employer may ordinarily rely on the presumption that those using the article will first detect its defect." Among others the court cited *Marsh* v. *Chickering*, 101 N. Y. 396, 5 N. E. 56, wherein the rule is stated thus: "As a general rule, it is to be supposed that the master who employs a servant has a better and more comprehensive knowledge as to the machinery and materials to be used than the employee, who has claims upon his protection against the use of defective or improper materials or appliances while engaged in the performance of the service required of him. The rule stated, however, is not applicable in all cases, and, where the servant has equal knowledge with the master as to the machinery used or the means employed in the performance of the work devolving upon him, and a full knowledge of existing defects, it does not necessarily follow that the master is liable for injuries sustained by reason of the use thereof." In this case the action was brought for alleged negligence on the part of the defendant in not furnishing a suitable ladder for the use of plaintiff in lighting lamps in front of defendant's building.

In *Cregan* v. *Marston*, 126 N. Y. 568, 22 Am. St. Rep. 854, 27 N. E. 952, it was held that the master had fully discharged his duty to his employees when he had furnished suitable appliances for unloading coal from vessels, and suitable materials for repairs rendered necessary from time to time, but not requiring the services of skilled mechanics.

In *O'Brien* v. *Missouri, K. & T. Ry. Co.*, 36 Tex. Civ. App. 528, 82 S. W. 319, the plaintiff, in the employ of defendant,

having use for a wrench for tightening the nuts on the steam-chest on one of its locomotives, and it not being convenient to secure a suitable one from plaintiff's toolbox, sent his helper to get one from defendant's roundhouse, which he did. The one secured was defective. In affirming a judgment for the defendant the court used this language: "The wrench seems to have been a simple tool, and we are of the opinion that the defendant might assume that employees using such a tool would discover a defect resulting from its being worn out." A like conclusion was reached in *Wachsmuth* v. *Shaw Electric Crane Co.*, 118 Mich. 275, 76 N. W. 497: "In heavy or complicated machinery, and where the person called upon to use the appliance may not possess the skill to detect unfitness or the opportunities to do so, the law may require diligence upon the part of the master; but, where the appliance is a common tool, of which the man who uses it is necessarily well qualified to judge, when he uses it, has an opportunity to know its condition, a distinction may be made, and the master may rely upon the servant to inform him of the defect, or not use the tool if it is unsafe." (See, also, 1 Labatt on Master and Servant, sec. 161.)

Tested by the rule announced in the cases cited, the court was in error in the instruction quoted above in declaring the duty of inspection absolute. We think the correct rule to be as stated in *Gulf, C. & S. F. R. Co.* v. *Larkin*, 98 Tex. 225, 82 S. W. 1026, 1 L. R. A., n. s., 944, that this duty arises when the character of the appliance is such, taking into consideration the intelligence and experience of the employee, that a reasonably prudent man under like circumstances would deem the inspection necessary in order to guard against injury to one of his employees about to make use of it. The question presented here is analogous to that which arises when the servant is a minor. Ordinarily, in such cases whether the obligation to instruct was incumbent upon the master is not a question of law for the court, but one of fact for the jury upon the evidence submitted. (*Forquer* v. *Slater Brick Co.*, 37 Mont. 426, 97 Pac. 843.) The instruction

is erroneous, and for this reason the judgment and order must be reversed.

We are aware that a different conclusion has been announced by other courts in cases in which the facts bear great similarity to those presented by this case. Of these cases *Baltimore & Ohio etc. R. Co.* v. *Amos*, 20 Ind. App. 378, 49 N. E. 854, and *Louisville etc. R. Co.* v. *Roberts*, 24 Ky. Law Rep. 1160, 70 S. W. 833, are examples. But any other rule than that announced here would, it seems to us, result in great hardship and inconvenience to all those engaged in industries where the employees are required to use only simple appliances which do not involve in themselves the element of danger.

Error is assigned upon the refusal of the court to submit to the jury refused instructions Nos. 17 and 19. There is no merit in these assignments. The latter is fully covered by the charge given. The former we do not regard as a correct statement of the law applicable to this case, but deem it unnecessary, in view of what has already been said, to make special comment upon it.

We find no error in the rulings on questions of evidence.

The judgment and order are reversed and a new trial ordered.

Reversed and remanded.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

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PRENTICE, RESPONDENT, v. MCKAY ET AL., APPELLANTS.

(No. 2,603.)

(Submitted December 14, 1908. Decided January 11, 1909.)

[98 Pac. 1081.]

Waters and Water Rights—Appropriation on Private Property—License—Revocation.

Water Rights—Appropriation on Private Property.

1. Neither sections 2339, 2340, United States Revised Statutes, nor sections 4840 et seq., Revised Codes, regulating the acquisition of the use of water by appropriation, have authorized, or could authorize, a person to go upon the private property of another for the purpose of making an appropriation, except by condemnation proceedings.

Same—Statutes—Apply to Public Lands Only.

2. Sections 4840-4891, Revised Codes, regulating the acquisition of the use of water by appropriation in this state, apply only to appropriations made on the public lands of the United States or of the state, and to such as are made by individuals who have riparian rights either as owners of riparian lands or through grants from such owners.

Same—Manner of Acquisition on Private Lands.

3. One may not acquire a water right on the land of another without acquiring an easement in such land, created either by operation of law, by an instrument in writing or by prescription.

Same—Appropriation on Private Property—License—Revocation.

4. Where the record on appeal in a water right contest failed to disclose that plaintiff in making an appropriation of water upon the lands of defendant had resorted to condemnation proceedings or received a grant of an easement in that regard, or acquired it by adverse user, plaintiff had only a license, which, not having been one coupled with an interest or one for which a valuable consideration had been paid, was revocable at the pleasure of the licensor or his successor in interest.

Same—License—Revocation—What May Constitute.

5. The action of a licensor in obstructing the use of water appropriated on his lands by means of a license not coupled with an interest or acquired for a valuable consideration, amounted to a revocation of the license.

Appeal from District Court, Madison County; E. K. Cheadle, Judge.

ACTION by Octavia Prentice against Caroline McKay and another. Judgment for plaintiff, and defendants appeal from it and an order denying them a new trial. Reversed and remanded.

Messrs. Clark & Duncan, for Appellants.

Mr. Edmund Callaway, and *Mr. S. V. Stewart*, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought by Octavia Prentice against Caroline McKay and Thomas Galahan to quiet title of plaintiff to a certain water right, and to secure an injunction restraining the defendants from interfering with the free use and enjoyment of such right by the plaintiff. The court found that the plaintiff was the owner of forty acres of land in section 18, township 4 south, of range 5 west, in Madison county; that this land is arid, and that forty miner's inches of water are required for its successful irrigation; that in 1893 the predecessor in interest of plaintiff owned the land in section 18 now owned by the plaintiff; that on July 15, 1893, the predecessor of plaintiff constructed a ditch from certain springs and a stream on section 19, and by means thereof conducted forty miner's inches of water to and upon the land in section 18. Finding No. 5 is as follows: "That the said lands with the said water right was thereafter, by mesne conveyance, conveyed to the plaintiff herein, Octavia Prentice." The court also found that ever since the waters were so diverted the plaintiff and her predecessor in interest have continuously used the same for the irrigation of the lands in section 18. From these facts the court concluded that the plaintiff is entitled to an appropriation of forty miner's inches of the waters of the springs and stream mentioned, and entered a decree quieting the plaintiff's title to the same, and enjoining the defendants from interfering therewith. From the judgment and an order denying them a new trial, the defendants have appealed.

It appears that on and prior to December 11, 1890, S. C. Prentice was the owner of the lands in section 19, upon which are the springs and stream mentioned in the findings; that on December 11, 1890, S. C. Prentice and his wife, Octavia, the plaintiff below

and the respondent here, executed and delivered to Caroline McKay, the defendant and appellant, a mortgage upon the land in section 19; that on June 2, 1898, Mrs. McKay commenced an action in the district court of Madison county against S. C. Prentice and Octavia Prentice, his wife, to foreclose the mortgage; that such proceedings were had and done in the action that on June 27, 1899, a decree of foreclosure was duly given and made in favor of Mrs. McKay and against S. C. Prentice and Octavia Prentice, which decree provided that the sums of money mentioned therein constituted a valid lien upon the land in section 19 above by virtue of the mortgage so given, and directed a sale of the premises; that a sale thereof was made by the sheriff of Madison county as directed; that at such sale Mrs. McKay became the purchaser; that there was not any redemption from the sale within the time allowed by law; that on February 6, 1900, the sheriff executed and delivered to Mrs. McKay a deed for the premises; and that ever since she has been the owner and in possession of the property. It also appears that some time prior to 1893 S. C. Prentice had made a tree culture entry upon the lands in section 18 above, and the court apparently found that he constructed a ditch from the springs and stream on section 19 to irrigate this land in section 18, although we are unable to find any evidence to justify such a finding. It appears that S. C. Prentice abandoned his tree culture entry, and that his wife, Octavia, made a desert entry upon the same land. We have searched the record in vain for evidence of any sort of a transfer from S. C. Prentice to his wife of any interest in the land or the water right. Even assuming that S. C. Prentice made a valid appropriation of the water in 1893, and assuming, further, but not deciding, that he could have made a valid transfer thereof to his wife, still, in the absence of a showing of a transfer of such right to her, she cannot claim the same by virtue of his appropriation.

There does not appear to be any evidence to support finding No. 5 above. If we give to the evidence offered on behalf of the plaintiff that construction most favorable to her, it would seem

that in 1893 she went into possession of the whole, or at least a portion, of this forty-acre lot in section 18, and constructed a ditch from these springs and stream; that in 1894 she planted an orchard and irrigated it by means of the ditch dug in 1893; that in 1899 she made a desert entry upon the forty-acre tract, and about the same time constructed a larger ditch from the springs and stream to her orchard and filed a notice of appropriation; that she afterward received patent for the land and has ever since owned and been in possession of it, and used the water continuously from 1893 until the use was obstructed by the defendants.

This being a suit in equity, we may inquire whether the respondent in fact made an appropriation of this water in 1893 or in 1899. The water which she assumed to appropriate was produced in springs and a stream on the land in section 19 above, then owned by S. C. Prentice in fee, subject only to a mortgage to Mrs. McKay. The United States and the state of Montana have recognized the right of an individual to acquire the use of water by appropriation (Rev. Stats. U. S., secs. 2339, 2340 [U. S. Comp. Stats. 1901, p. 1437]; Revised Codes, secs. 4840 et seq.; *Wood* v. *Etiwanda Water Co.*, 122 Cal. 152, 54 Pac. 726; *Welch* v. *Garrett*, 5 Idaho, 639, 51 Pac. 405); but neither has authorized, nor, indeed, could authorize, one person to go upon the private property of another for the purpose of making an appropriation, except by condemnation proceedings. The general government has merely authorized the prospective appropriator to go upon the public domain for the purpose of making his appropriation (see note to *Heath* v. *Williams*, 43 Am. Dec. 265, [25 Me. 209]), and the statutes of this state (sections 4840-4891, above) only apply to appropriations made on the public lands of the United States or of the state, and to such as are made by individuals who have riparian rights either as owners of riparian lands or through grants from such owners. This is the doctrine announced in *Smith* v. *Denniff*, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398, 50 L. R. A. 741, where the court further said: "A trespasser on riparian land cannot lawfully exer-

cise there any right to such water or acquire any right therein by virtue of sections 1880 et seq. of the Civil Code of 1895 [sections 4840 et seq., Revised Codes]. (*Alta Land Co.* v. *Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645)." In the same opinion this court also said: "One may not acquire a water right on the land of another without acquiring an easement in such land." And again: "An easement is an interest in land that cannot be created, granted, or transferred except by operation of law, by an instrument in writing, or by prescription." Since the use of water is declared by the Constitution of this state (Article III, sec. 15) to be a public use, the right to appropriate water on the land of another may be acquired by condemnation proceedings. (*Smith* v. *Denniff*, above; *St. Helena Water Co.* v. *Forbes*, 62 Cal. 182, 45 Am. Rep. 659.) If Mrs. Prentice made a valid appropriation of water upon the private lands of S. C. Prentice, she must have acquired an easement in his lands (*Smith* v. *Denniff*, above), and, if she did acquire such easement, she must have done so by grant from S. C. Prentice, by condemnation proceedings or by prescription (*Smith* v. *Denniff*, above). But the record here fails absolutely to disclose that Mrs. Prentice ever resorted to condemnation proceedings, or ever received a grant of the easement or acquired it by adverse user. We are not called upon, therefore, to determine what, if any, effect should be given to a grant of an easement by S. C. Prentice while his premises were mortgaged. So far as this record discloses, the transaction between S. C. Prentice and Mrs. Prentice amounted only to a license by the former to the latter to take the water from the springs and stream to her land, and, not being a license coupled with an interest, nor one for which a valuable consideration was paid, it was revocable at the pleasure of the licensor or his successor in interest (*Great Falls Waterworks Co.* v. *Great Northern Ry. Co.*, 21 Mont. 487, 54 Pac. 963); and the actions of the defendants in this particular instance in obstructing the use of the license amounted to a revocation thereof (25 Cyc. 651, and cases cited).

The judgment and order are reversed and the cause is remanded to the district court, with directions to vacate the judgment and order heretofore made, and to enter judgment for the defendants.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

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STATE EX REL. COHN ET AL., RELATORS, v. DISTRICT COURT ET AL., RESPONDENTS.

(No. 2,630.)

(Submitted December 12, 1908. Decided January 11, 1909.)

[99 Pac. 139.]

Supervisory Control—Attorneys—Notice—Service by Mail—When Insufficient—New Trial—Practice—Appeal—Certiorari.

Entry of Judgment—Notice.

1. *Held*, that the entry of judgment is one of the "subsequent proceedings" mentioned in section 7149, Revised Codes, of which a defeated party or his attorney is entitled to notice.

Same—Notice—Service by Mail—When Insufficient.

2. Service of a notice upon an attorney can be made through the mail, only in the event that his place of residence is not known; therefore, where the location of both the office and residence of an attorney was known to opposing counsel, their notice to him, through the mail, of the entry of a judgment, was insufficient.

Same—Defective Service—Not Cured by Actual Receipt of Notice.

3. Since the notice mentioned in the foregoing paragraph was not a legal notice, i. e., one served according to law, the actual receipt of the letter notifying the attorney upon whom service was thus sought to be made, of the entry of judgment, was not effective, and his notice of intention to move for a new trial, served and filed after the lapse of ten days from receipt of the letter, was timely.

New Trial—Notice—Service and Filing—Presumptions.

4. Unless the contrary appears affirmatively from the record on appeal, it will be presumed that a notice of intention to move for a new trial was served and filed in time; the burden of showing the contrary rests upon the party claiming that it was not.

Statutes—Liberal Construction—Limitation.

5. While the provisions of the Codes should be liberally construed, such liberality should not be so far extended as to annul altogether specific provisions thereof.

New Trial—Motion "Upon Minutes of Court"—Practice.

6. Under section 6795, Revised Codes, the district court may, upon a motion for a new trial made "upon the minutes of the court," take into consideration all the pleadings, records, minute entries and the evidence offered at the trial, and from the entire case thus presented determine the motion; and if the judge can remember the evidence and proceedings sufficiently to enable him to pass upon the motion, it is not necessary that the stenographer's notes of the trial proceedings be transcribed.

Same—Remission—Power of Court.

7. The district court has power to grant a new trial unless the successful party remit a portion of the judgment.

Same—Remission—Presumptions.

8. In the absence of the evidence from the record, it will be presumed that the action of the court in ordering a new trial unless remission of all but $225 of a $3,600 judgment be agreed to by the successful party was fully justified.

Appeal—Service of Notice—Deficiency in Law—Supervisory Control.

9. Appeals being only allowed under such regulations as may be prescribed by law (Constitution, Article VIII, section 15), and the law not having made provision for the appointment, temporarily, of some one upon whom service of notice of an appeal from an order granting a new trial could be made in place of an adverse party who had died after the order was made, the supreme court, on application for writ of supervisory control, looking to the annulment of the order, cannot grant relief. The deficiency in the law in this respect can be supplied only by legislative, not judicial, action.

Certiorari—New Trial Order—Jurisdiction.

10. *Certiorari* does not lie to review an order granting a new trial, where the district court had jurisdiction to hear the motion.

ORIGINAL APPLICATION by the state, on the relation of Louis Cohn, next friend of Lessing Cohn and another, minors, against the district court of the second judicial district and George M. Bourquin, a judge thereof, for a writ of supervisory control. Dismissed.

Messrs. Breen & Hogevoll, and *Messrs. Maury & Templeman,* for Relators.

Mr. William I. Lippincott, for Respondents.

The time to give notice of intention does not commence to run from the decision, but from notice of the decision. (Hayne on New Trial (1889), sec. 19, subd. 2.) The notice of judgment is to be construed most strongly against the party giving it. (*Carpentier* v. *Thurston,* 30 Cal. 124.) Service of a notice by mail is good only when the person making the service, and the

person on whom it is to be made, reside or have their offices in different places, between which there is a regular communication by mail. (*People* v. *Alameda T. Co.*, 30 Cal. 184; *Moore* v. *Besse*, 35 Cal. 186.) A party relying upon a service of a notice by mail, or otherwise than by actual service on the proper person, must show a strict compliance with the requirements of the statute. (*People* v. *Alameda T. Co., supra; Bross* v. *Nicholson*, 1 How. Pr. 158; *Schenck* v. *McKie*, 4 How. Pr. 247; *Anon.*, 1 Hill, 217; *Anon.*, 25 Wend. 677; *Birdsall* v. *Taylor*, 1 How. Pr. 89; *Paddock* v. *Beebee*, 2 Johns. Cas. 117.) In *Cunningham* v. *Warnekey*, 61 Cal. 507, the court held that an affidavit of service of notice of appeal must disclose the fact of residence in different places.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On and prior to March 18, 1908, there was pending in the district court of Silver Bow county, and in the department thereof presided over by Hon. George M. Bourquin, Judge, a certain cause entitled "Sidney Cohn and Lessing Cohn, Minors, by Louis Cohn, their Guardian *Ad Litem*, v. Henry Albertson and George Kendall, No. A741," in which cause Maury & Templeman were the attorneys for the plaintiffs, and W. I. Lippincott was the attorney for the defendants. Such proceedings were had and done in the cause that on March 18, after trial and a verdict, judgment was duly given, made and entered in favor of the plaintiffs and against the defendants for the sum of $3,600 and costs. On March 19 the attorneys for the plaintiffs sent through the mail to Mr. Lippincott a letter notifying him that on March 18 the judgment above mentioned had been rendered and entered. On April 18 the defendants, through Mr. Lippincott, served and filed their notice of intention to move for a new trial, specifying, as the grounds of the motion, insufficiency of the evidence to justify the verdict, and excessive damages, appearing to have been given under the influence of passion and prejudice, and gave notice that their motion would be made upon a state-

ment of the case and bill of exceptions, and also upon the minutes of the court. The attorneys for the plaintiffs made timely objection that the notice of intention came too late. On April 22 another notice of intention to move for a new trial was served and filed by counsel for the defendants, which notice contained these grounds, in addition to the grounds of the motion mentioned in the first notice, to-wit: That the verdict is against law, and errors in law occurring at the trial and excepted to by the defendants. This notice specified that the motion would be made upon the minutes of the court, and that the second notice was intended to supersede and take the place of the notice given on April 18. Timely objection was also made to this notice. It appears that there was not any bill of exceptions presented in support of this motion for a new trial. On June 13 the district court heard arguments upon the motion for a new trial, over objection of counsel for the plaintiffs, and on June 27 an order was made granting the motion for new trial unless the plaintiffs would remit all of the judgment in excess of $225. Counsel for the plaintiffs immediately gave notice to the court that they would refuse to remit any portion of the judgment, and thereupon the court made an absolute order granting the defendants a new trial. On August 2 the defendant George Kendall died, and there was not any executor or administrator of his estate. On November 28 the plaintiffs made application to this court for a writ of supervisory control, thereby seeking to have annulled the order of the district court granting the defendants a new trial.

It is earnestly contended by counsel for the relators in this court that the notice of intention to move for a new trial was served and filed too late. Opposing counsel replies by saying that he was never given notice of the entry of judgment, though admitting that he did receive the letter of March 19, stating that a judgment had been entered. This first contention, then, is to be resolved by determining what effect, if any, shall be given to the letter of March 19.

Section 6796, Revised Codes, provides, among other things: "The party intending to move for a new trial must, within ten days after receiving notice of the entry of the judgment, serve upon the adverse party and file with the clerk a notice of his intention, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits or the minutes of the court or a bill of exceptions. * * * " Chapter V, Part II, Title XIV (sections 7145-7152), of the same Code, is entitled "Notices and Filing and Service of Papers." Section 7149 provides: " * * * After appearance, a defendant or his attorney, is entitled to notice of all subsequent proceedings of which notice is required to be given. * * * " Since by section 6796, above, the defeated party is not required to act until he receives notice of the entry of judgment, but has ten days after the receipt of such notice within which to serve and file his notice of intention to move for a new trial, we must conclude that the entry of judgment is one of the "subsequent proceedings" mentioned in section 7149 above, of which the defendants in *Cohn et al.* v. *Albertson and Kendall* were required to be given notice. Section 7145 provides that notices shall be in writing, and, so far as a case of this character is concerned, section 7146 provides the manner of making service of any notice required to be served.

In the return to the order to show cause herein, it is alleged—and not controverted by counsel for relators—that Maury & Templeman and W. I. Lippincott all reside in Butte, and that, at all the times mentioned, Maury & Templeman knew where Lippincott's office and residence were located. In view of these facts, was the service by mail of the notice of entry of judgment sufficient? Section 7146, above, provides that service of notice upon an attorney is to be made (a) by personal service, or (b) by leaving the notice in his office with his clerk or other person having charge, or (c) by leaving the notice in a conspicuous place in his office, if there is not anyone in the office, or (d) if the office is not open, by leaving the notice at the attorney's residence with some person of suitable age and discretion, and,

finally, if the attorney's residence is not known, then (e) by sending such notice through the mail. The second subdivision of section 7146 is not applicable to the facts of this case, and need not be considered. There was not any attempt to make service upon Albertson or Kendall, but the service, if any, was sought to be made upon their attorney, W. I. Lippincott. It is to be observed, from the portion of the section which we are considering, that service of a notice upon an attorney can be made through the mail only in the event that the place of residence of the attorney is not known. Subdivision "e" above, then, has no application here, since it appears that the place of Mr. Lippincott's residence was known to Maury & Templeman.

But it is suggested that, since Lippincott actually received the letter of March 19, actually received notice, the purpose of section 6796 has been fulfilled; but a sufficient answer to this is that the notice contemplated in section 6796 is a legal notice, which must mean the kind of notice described in section 7145, served in the manner described in section 7146. Unless the contrary appears affirmatively from the record, it will be presumed that the notice of intention was served and filed in time. (*Roussin* v. *Stewart*, 33 Cal. 208; *Burnett* v. *Stearns*, 33 Cal. 468.) In other words, the relators here, who are insisting that the notice of intention was not in time, have the burden of showing that fact, and, since the time for filing and service of the notice commenced to run only from the receipt of notice of the entry of judgment, this imposes upon them the burden of showing that they gave the required notice of the entry of judgment, which, in our opinion, they failed to do.

We appreciate the fact that the provisions of the Codes are to be liberally construed, with a view to effect their objects and promote justice; but we do not believe that we should extend such liberality so far as to annul altogether specific provisions of the Codes. In this instance, to say that service of notice may be made by mail in a case where the facts are as herein stated, would be tantamount to saying that section 7146, above, is a dead letter, and that its provisions need not be observed at all.

There was not any attempt made to comply with the terms of this section, and not any excuse offered for the failure. There is not any question of waiver involved here, and, upon the record made, we hold that the letter of March 19 was not effective as a notice of the entry of judgment. Therefore, the notice of intention to move for a new trial, dated April 24, was served and filed in time, and the district court had jurisdiction to hear and determine a motion for a new trial.

But it is said that, since the court did not have a bill of exceptions or any affidavits before it, it did not have anything upon which to act. The notice of intention stated that the motion would be made upon the minutes of the court. There seems to be considerable doubt in the minds of attorneys, as to what the legislature meant in the amendment of 1907 by the use of the terms "upon the minutes of the court." (Revised Codes, sec. 6795.) We had a similar provision in the Revised Statutes of 1879 (section 286; First Division), and in the Compiled Statutes of 1887 (section 297; First Division), but, so far as we know, there has not been any decision by this court which undertook to give a definition of the terms or to indicate the scope of their meaning. Other states have somewhat similar statutes, and a review of these, and the decisions of courts construing them, has led us to conclude that the purpose which our legislature had in view, doubtless, was to facilitate the proceeding for a new trial and save the moving party useless expense in the event his motion should be granted and no appeal taken. If we are correct in this conclusion, then it follows, in the absence of any restriction in the statute, that the review by the trial court may be as comprehensive as if all the proceedings had been reduced to writing and embodied in the judgment-roll, including a bill of exceptions. In other words, upon a motion for a new trial made upon the minutes of the court, the trial court may take into consideration all the pleadings, records, minute entries, and the evidence offered at the trial, and, from the entire case thus presented, determine the motion; and in such event it is not even necessary that the stenographer's notes of the trial proceedings

be transcribed, if the presiding judge can remember the evidence and the proceedings sufficiently to enable him to pass upon the motion. If either party desires to appeal from the order, a bill of exceptions can be prepared and settled after the order is made. It is manifest that the legislature assumed that a proceeding for a new trial upon the minutes of the court would be taken immediately after the conclusion of the trial, and heard while the entire matter was fresh in the recollection of the presiding judge, who would then be as well qualified to determine the motion as he would be after the delay incident to the preparation and settlement of a bill of exceptions, even though in the latter case he would have the proceeding reduced to writing. Reference may be had to 14 Encyclopedia of Pleading and Practice, 914; 1 Spelling's New Trial and Appellate Practice, sec. 392, and 29 Cyc. 964, for discussions of the subject now under consideration. If we are correct in our interpretation of this statute, then the district court doubtless had everything before it necessary to a proper determination of the motion for a new trial.

That the trial court had authority to order a new trial unless the plaintiffs remitted a portion of the judgment has been recognized in this jurisdiction for many years. (*Cunningham* v. *Quirk*, 10 Mont. 462, 26 Pac. 184; *Kennon* v. *Gilmer*, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. Ed. 110.) Whether the court was justified in ordering the plaintiffs to remit so large a portion of the judgment can only be determined by an examination of the evidence, which we do not have before us, and in its absence we must presume that the action of the trial court was fully justified.

Finally, it is suggested that the death of Kendall left the plaintiffs remediless, unless this court grants relief, since there is not anyone representing Kendall upon whom a notice of appeal from the order granting a new trial can be served. It may be that our laws are deficient in failing to provide for such an emergency; but the right of appeal in any case is not an absolute one. Appeals are only allowed under such regulations

as may be prescribed by law (Constitution, Art. VIII, sec. 15), and the failure of the legislature to prescribe the necessary regulations for an emergency case of this character is not sufficient to justify the intervention of this court. It is not the province of this court to supply deficiencies in the law. It would seem, however, that some provision should be made in the law for an emergency of this character. Since it is necessary that a notice of appeal be served upon all adverse parties, it would seem that, pending the appointment of an administrator or the qualification of an executor, there should be provision for the appointment, temporarily, of some one upon whom service could be made; but a suggestion of this character can only be made properly to the legislature.

We have considered this application only so far as it seeks the aid of this court by a writ of supervisory control. Having determined that the district court had jurisdiction to hear the motion for a new trial, the order cannot be reviewed on *certiorari*. Suggestion is also made that a writ of error might be used in this instance; but even if we assume, without deciding, that, in the absence of any statutory provisions, a writ of error may issue, still it would not serve the relators herein any further than the proceedings for appeal do now, since service of the citation in error could not be made.

We do not think this record presents a case which justifies our interference. The proceeding is therefore dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

LARSON ET AL., APPELLANTS, v. PEPPARD, RESPONDENT.

(No. 2,582.)

(Submitted December 15, 1908. Decided January 18, 1909.)

[99 Pac. 136.]

Tax Deeds—Quieting Title—Equity—Condition Precedent to Maintaining Action—Interest—Form of Decree.

Tax Deeds—Quieting Title—Suit in Equity.

1. An action brought by a land owner under the provisions of section 6870, Revised Codes, to quiet the title to premises sold for delinquent taxes, is one in equity.

Same—Quieting Title—Condition Precedent to Maintaining Action.

2. *Held*, that the maxim, "He who seeks equity must do equity," applies in an action by a land owner to quiet title to land sold for delinquent taxes, and that, as a condition precedent to maintaining his action, the plaintiff will be required to pay to the tax deed holder the amount of taxes which plaintiff should have paid, even conceding that, by reason of irregularities, the sale did not divest the owner of title, and no action could have been maintained by the purchaser to recover back the amounts paid by him, and although the rule of *caveat emptor* applies to the purchase at a delinquent tax sale.

Same—Quieting Title—Decree—Interest.

3. The action by the land owner above referred to, not having been one to redeem from a tax sale, the court erred in allowing interest at the rate of two per cent per month from the time the delinquent taxes were paid by defendant. Interest at the legal rate only was recoverable.

Same—Quieting Title—Form of Decree.

4. The court decreed that the plaintiff land owner's title to land, sold for delinquent taxes, be quieted, subject to a lien in favor of defendant for the amounts paid by him. The better practice in a case of this kind *held* to be, for the court to enter an order requiring plaintiff to make payment to defendant of the sums paid by the latter, with interest, within a reasonable time, the decree quieting title to be made upon payment, otherwise relief of any kind whatever to be denied plaintiff.

Appeal from District Court, Missoula County; F. C. Webster, Judge.

SUIT by Margaret Larson, executrix, and others against O. E. Peppard. From a decree granting partial relief, plaintiffs appeal. Reversed and remanded.

Messrs. H. G. & S. H. McIntire, for Appellants.

The provisions of the statutes concerning assessments and sales for delinquent taxes, especially where the same are in peremp-

tory language, are mandatory, must be strictly construed, and must be at least substantially complied with. Failing in this, the title of the owner of the property sold cannot be divested nor encumbered. (*Birney* v. *Warren*, 28 Mont. 68, 72 Pac. 293; Cooley on Taxation, 2d ed., pp. 266-274; *People* v. *Central P. R. Co.*, 83 Cal. 393, 23 Pac. 303; *Lake County* v. *Sulphur Bank etc. Co.*, 66 Cal. 20, 4 Pac. 876; *Gomer* v. *Chaffee*, 6 Colo. 314; *Cache Co.* v. *Jensen*, 21 Utah, 207, 61 Pac. 306; *Weyse* v. *Crawford*, 85 Cal. 196, 24 Pac. 736; *Shipman* v. *Forbes*, 97 Cal. 572, 32 Pac. 599.)

Where the statute prescribes the contents of a tax deed, a failure to observe the same is fatal to its validity. (*Anderson* v. *Hancock*, 64 Cal. 455, 2 Pac. 31; *Grimm* v. *O'Connell*, 54 Cal. 522; *Hubbell* v. *Campbell*, 56 Cal. 527; *Hughes* v. *Cannedy*, 92 Cal. 382, 28 Pac. 573.) It is elementary law that no man can be made a debtor for money paid by another unless it was paid at his request. (*Donovan-McCormick Co.* v. *Sparr*, 34 Mont. 243, 85 Pac. 1029; *Flournoy* v. *Flournoy*, 86 Cal. 294, 21 Am. St. Rep. 39, 24 Pac. 1012.) Voluntary payments of taxes are like other voluntary payments, and are not recoverable. (*Greenwood* v. *Adams*, 80 Cal. 74, 21 Pac. 1134; *Dranga* v. *Rowe*, 127 Cal. 510, 59 Pac. 944; *Harper* v. *Rowe*, 53 Cal. 238; *Dowell* v. *City of Portland*, 13 Or. 252, 10 Pac. 308; *McCormick* v. *Edwards*, 69 Tex. 109, 6 S. W. 32; Cooley on Taxation, 2d ed., p. 546; *Rowe* v. *Current River L. & C. Co.*, 99 Mo. App. 158, 73 S. W. 362; *Curtis* v. *Parks*, 55 Cal. 106; *Flournoy* v. *Flournoy*, 86 Cal. 294, 21 Am. St. Rep. 39, 24 Pac. 1012; *Huddleston* v. *Washington*, 136 Cal. 519, 69 Pac. 146; *Hamer* v. *Weber Co.*, 11 Utah, 1, 37 Pac. 746; *Paine* v. *Germantown T. Co.*, 136 Fed. 533, 69 C. C. A. 303; *Sheets* v. *Paine*, 10 N. D. 103, 86 N. W. 117; *Am. Ins. Co.* v. *County of Beadle*, 5 S. D. 415, 59 N. W. 212; *Mitchell* v. *Minnequa Town Co.*, 41 Colo. 367, 92 Pac. 678; *Homestead Co.* v. *Valley R. R.*, 17 Wall. 153, 21 L. Ed. 622.) That a lien on the land could not be decreed, and that the voluntary payment of taxes by one, a remainderman, cannot be recovered from the life tenant, see *Huddleston* v. *Washington*, 136 Cal.

519, 69 Pac. 146; *Curtis* v. *Parks, supra; Moulton* v. *Loux,* 52 Cal. 81; *McGee* v. *City San Jose,* 68 Cal. 91, 8 Pac. 641. *Assumpsit* will not lie by a husband to recover taxes paid on his wife's land, in the absence of a request by her, or of a promise of repayment. (*Doughty* v. *Miller,* 50 N. J. Eq. 529, 25 Atl. 153.)

Messrs. Woody & Woody, for Respondent.

Construing sections 83 and 121 of Session Laws, 1891, together, it necessarily follows that any lien which the state may have had on the real estate involved in this controversy, for taxes for the year 1893, passed to and became vested in the purchaser at the tax sale. (*Green* v. *McGrew,* 35 Ind. App. 104, 111 Am. St. Rep. 149, 72 N. E. 1049, 73 N. E. 832; *Comstock Ferre & Co.* v. *Devlin,* 99 Minn. 68, 108 N. W. 888; *Merriam* v. *Hemple,* 17 Neb. 345, 22 N. W. 775; *Weston* v. *Meyers,* 45 Neb. 95, 63 N. W. 117; *Wagner* v. *Underhill,* 71 Kan. 637, 81 Pac. 177; *Gregory* v. *Bartlett,* 55 Ark. 30, 17 S. W. 344; *Parks* v. *Watson,* 20 Fed. 764.) A purchaser at a judicial sale, void on account of any irregularity in the notice of sale, manner or place of sale, is subrogated to the rights of the judgment creditor, and is entitled to be reimbursed by the owner of the property on account of the price paid by him at the sale, and also on account of all amounts paid for taxes subsequent to the sale. (17 Am. & Eng. Ency. of Law, p. 1024; 6 Current Law, p. 267, and authorities cited; Freeman on Executions, 2d ed., sec. 352, and authorities cited.) The purchaser of a tax title acquires all the rights and remedies of the tax deed holder. (*Comstock Ferre & Co.* v. *Devlin,* 99 Minn. 68, 108 N. W. 888; *Wheeler Co.* v. *Pates,* 43 Wash. 247, 86 Pac. 625; *Alexander* v. *Goodwin,* 20 Neb. 216, 29 N. W. 468.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was commenced in the district court of Missoula county by Peter Larson against O. E. Peppard for the purpose

of having determined any adverse claim of the defendant to certain pieces and parcels of land situated in the city of Missoula, and claimed to be owned by, and in the possession of, plaintiff and the heirs at law of one John Woods, deceased. The plaintiff died, and the personal representatives of his estate were substituted as plaintiffs. The complaint is in the ordinary form of actions to quiet title. The prayer is that the defendant be required to set forth the nature of his claim, that it be determined to be without right, and that the defendant be enjoined from asserting any claim to the premises. In addition to other defenses, the answer sets forth that in 1893 the premises in controversy were owned by Larson and Woods, and were assessed by the assessor of Missoula county for taxation to such owners; that the taxes were not paid within the time allowed by law before they became delinquent; that the property was advertised for sale for delinquent taxes; that a sale thereof was had, and at such sale Frank D. Low became the purchaser of the property and received the treasurer's certificate of sale; that in March, 1896, the county treasurer of Missoula county executed and delivered to Low a treasurer's deed for the property; that in 1896 Low and his wife executed and delivered to the defendant a quitclaim deed to the property; that from 1894 to 1901 the property was assessed to Low, and from 1902 to 1906 to this defendant; that all the taxes levied upon the property for 1894 and 1895 were paid by Low, and the taxes for 1897 to 1906 were paid by the defendant. The answer prays that, if it be found that the title to the property still remains in Larson and Woods, the defendant be adjudged to have a lien upon the property for the amounts paid by himself and his predecessor. The cause was tried to the court sitting without a jury. A decree was rendered and entered quieting plaintiff's title to an undivided one-half interest in the property, subject to a lien of defendant upon the whole property for the different amounts paid for taxes. From this judgment the plaintiffs have appealed.

It may be conceded that the proceedings taken in connection with the taxes for 1893 were so far irregular that the sale of the property by the county treasurer did not operate to divest Larson and Woods of their title to the property; and it may be conceded, further, for the purposes of this case, that, by reason of such irregularities, neither Low nor Peppard could maintain an action at law to recover back the amounts paid by him. But this is an action prosecuted under the provisions of section 6870, Revised Codes, and this court has repeatedly held that such an action is one in equity. (*Montana Ore Pur. Co.* v. *Boston & Montana Con. C. & S. Min. Co.*, 27 Mont. 288, 70 Pac. 1115; *Mares* v. *Dillon*, 30 Mont. 117, 75 Pac. 963; *North Real Estate L. & T. Co.* v. *Billings L. & T. Co.*, 36 Mont. 356, 93 Pac. 40.) Larson, then, having appealed to a court of equity to relieve his property from the outstanding claim of the defendant, the court could properly apply to him the maxim, "He who seeks equity must do equity." The property was subject to taxation. There was at least an attempt made to levy and collect the taxes. Larson and Woods owed the duty to bear their just proportion of the burden of state, county, and city governments. They failed to discharge the duty in this instance, and Peppard and his predecessor discharged it for them, under the mistaken belief that they thereby acquired an interest in the property. The payments made were not voluntary, in the sense that they were made merely to discharge the obligations of Larson and Woods. But in a case of this character the particular inquiry which the court makes is to ascertain whether the property was in fact subject to taxation; whether the proceedings were so far in compliance with the law that the court can say that the land owners should have paid the taxes, and that such taxes were their just contributions toward the support of government. If these facts appear, then equity will compel the tardy land owners to do that which they should have done in the first instance—pay the taxes. It is certainly not imposing upon them any unreasonable or unjust burden to require them to bear their just proportion of the expense of government. No reason is

suggested why these particular parties should be relieved from the payment of any taxes whatever upon this property for sixteen or seventeen years. When Larson applied to the district court, sitting as a court of equity, to quiet the title to his property as against any claim of the defendant, and it appeared that the defendant's claim rested upon the payment of taxes under the circumstances of this case, the court in effect said to him: "You and your co-owner ought to have paid the taxes on this property, and, as a condition precedent to your having such property free from any claim made by the defendant by reason of his having paid the taxes which you ought to have paid, you must now discharge your duty, as nearly as can be done, by paying the amounts to this defendant, together with legal interest thereon."

The authorities are not entirely in harmony upon this subject. Some of the courts deny the right to impose any condition whatever; but the rule adopted by the trial court, and which is approved in principle, has the support of many courts and text-writers, and, in our opinion, is right and ought to prevail in this state.

The assessment and sale of property for delinquent taxes is a proceeding *in invitum*. The purchaser at such sale buys at his peril, and the rule of *caveat emptor* applies (*Birney* v. *Warren*, 28 Mont. 64, 72 Pac. 293); but the mere fact that the rule of *caveat emptor* applies is not any ground for relieving the land owners from the payment of burdens for which the land was in fact responsible, without first requiring such land owners to do that which they ought to have done. "The owner comes into a court of equity, asking that he be relieved from tax proceedings which he claims to be illegal. Before his prayer should be granted, he should do equity himself, and reimburse the tax purchaser." (*Powers* v. *First National Bank*, 15 N. D. 466, 109 N. W. 361.)

In a very large number of jurisdictions it has been held that in a suit to quiet title or to determine adverse claims to real estate, instituted by the owner against the tax deed holder, the

rule, "He who seeks equity must do equity," applies with full force and vigor, and that the payment or tender of the taxes which the owner ought to have paid will be held to be a condition precedent to his right to the relief demanded. In *Boeck* v. *Merriam*, 10 Neb. 199, 4 N. W. 962, the supreme court of Nebraska states the rule in the terse and vigorous language of Chief Justice Maxwell, as follows: "But can the party claiming to be the owner of the land be permitted to have a tax deed declared void upon the ground that it is a cloud upon his title, unless he states some ground for equitable relief other than a mere irregularity in the assessment? The burdens of taxation must be borne by the taxable property in the state, and a fair proportion of such taxation is to be assessed upon all such property according to its value, and is in justice and equity a just charge against the same. When a taxpayer, therefore, for any cause escapes taxation, an act of injustice is committed against every other taxpayer in the state, as this additional burden is thrown upon them. * * * And if the owner of real estate can wait until his land has been sold for taxes and until the certificate of sale has ripened into a deed, and then upon a mere technicality, without the payment or offer to pay the taxes justly chargeable against his property, have delivered up and canceled at the costs of the tax purchaser, as in this case, the tax deed, he not only entirely escapes the payment of legitimate taxes, but the owner of the tax deed is deprived of a valuable legal right—that of trial by jury—and is mulcted in costs for his temerity in purchasing at tax sale, while the party claiming to be the owner of the land takes no hazard of losing his land from an adverse title. But such is not the law. He who seeks to have a tax deed declared void where the taxes for which the land was sold were lawful taxes, and justly chargeable against the same, if legally assessed, must, as a condition of relief, pay or offer to pay the taxes justly due thereon. Otherwise he states no ground for equitable relief. He does not offer to do equity. He seeks the aid of the court to aid him, by giving effect to mere technicalities, to shield him from his just liabilities. It

is difficult to imagine a case more utterly barren of equity than this."

Early in the history of North Dakota the rule for which appellants here contend was recognized. In a case of this character the delinquent land owner was permitted to have the title to his property quieted without the payment of back taxes (see *Douglas* v. *Fargo*, 13 N. D. 467, 101 N. W. 919); but in *State Finance Co.* v. *Beck*, 15 N. D. 374, 109 N. W. 357, the former decisions were overruled, and, among other things, the court said: "If the sale is set aside unconditionally, even though the tax is not canceled, the county is chargeable with the accrued interest, and plaintiff gets the benefit of the use of the money without interest, which he ought to have paid years before, and his tax-paying neighbors must suffer for his laches. A court of equity will not tolerate such injustice. It will grant relief only on the condition that the party seeking it does equity. The burden of each taxpayer's neglect of his obligations should be borne by himself. Hence we shall hold that, as a condition to the vacation of the sale in question, the plaintiff must pay to the defendant Beck, or into court for him, the amount for which the land was sold, with interest thereon at seven per cent per annum from the day of sale. * * * We do not question the well-established rule that a tax title purchaser buys at his peril. The doctrine of *caveat emptor* applies to such a sale to its full extent. However circumscribed the rights of the tax title purchaser may be as compared with those of the land owner, the latter is not entitled to more than his legal rights. The infirmities of the tax title do not absolve the taxpayer from his obligation to do equity when he seeks equity. We agree that the tax title purchaser is entitled only to his pound of flesh in whatever form he demands it. But confining the tax title purchaser to his strict legal rights is one thing, and relieving the tax debtor from his just share of taxes at the expense of his neighbors is quite another. This case is a fair illustration of the injustice resulting from adhering to the rule, heretofore in force in this state, of not requiring payment of just taxes as a condition pre-

cedent to relief in this class of cases. The owner of the land in this case has not paid a cent of tax on this property for more than twenty years. It is not claimed that any of the taxes were excessive or unfair, or that they otherwise infringed any of the land owner's constitutional rights. The technical requirements of the law as to the procedure have not been followed with precision; and the land owner not only asks to have the tax sales set aside, but declines to pay or offer to pay a cent of the taxes which are confessedly just. Under the rule heretofore in force, he was sustained in that position. * * * By overturning the precedents on this question established by former decisions, we do not in any way disturb the rules by which the validity of past or future tax sales are to be tested. We disturb no rights which are justly entitled to protection. It surely cannot be claimed that those who have neglected to pay their just taxes are in any position to invoke the doctrine of *stare decisis* to continued immunity from their obligation to do equity when they seek equitable relief. We are satisfied that public policy necessitates this modification of former decisions, and it is further justified by the fact that it restores in this state the rule recognized and applied in other jurisdictions. * * * Chapter 166, page 232, Laws of 1903, is an express legislative establishment of the rule we have been discussing. As indicated above, the court has inherent power, independent of such a statute, to do what the statute requires."

In principle, the rule is stated and adopted by the following courts: *Wagner* v. *Underhill,* 71 Kan. 637, 81 Pac. 177; *Hole* v. *Van Duzer,* 11 Idaho, 79, 81 Pac. 109; *Hart* v. *Smith,* 44 Wis. 213; *Smith* v. *Gage,* 12 Fed. 32, 11 Biss. 217; *Fenton* v. *Minnesota etc. Co.,* 15 N. D. 365, 109 N. W. 363; *Phelps* v. *Harding,* 87 Ill. 442; *Denman* v. *Steinbach,* 29 Wash. 179, 69 Pac. 751; *Baldwin* v. *City of Elizabeth,* 42 N. J. Eq. 11, 6 Atl. 275. (See, also, 2 Desty on Taxation, 901, 982; Black on Tax Titles, sec. 442.) Many other authorities might be cited in support of this doctrine, but those given are deemed sufficient. In some of the states statutes have been enacted requiring the enforcement of

this rule, but the cases cited above were determined without reference to any statutory provision upon the subject.

The district court, however, erred in allowing interest at the rate of two per cent per month upon the payment made January 19, 1894. This is not a proceeding to redeem from a tax sale, and has not any of the characteristics of such a proceeding. The court should have allowed interest only at the legal rate. The form of the judgment or decree seems to have the approval of some of the authorities. We approve the action of the court in applying the maxim, "He who seeks equity must do equity," but in our judgment, the logical result from the application of that maxim would seem to be that the payment of the several amounts should be made a condition precedent to plaintiffs' right to the relief demanded. We think that the better practice would be in a case of this kind, for the trial court to enter an order requiring the plaintiffs to make such payment within a reasonable time, say thirty days. If the payment is made, then the decree quieting the title should be made and entered; but if the payment be not made within the time allowed, then the plaintiffs should be denied any relief whatever.

The cause will be remanded to the district court for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

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LAWSON, APPELLANT, v. COBBAN ET AL., RESPONDENTS.

(No. 2,581.)

(Submitted December 16, 1908. Decided January 18, 1909.)

[99 Pac. 128.]

Public Policy—Executors and Administrators—Real Property—Contracts of Sale—Future Conveyance.

Real Property—Contract of Sale—Future Conveyance—Administrators—Public Policy.

1. An agreement signed by one as administrator of an estate, and two others, to convey for a valuable consideration, at a future date, real estate not then owned by them, but belonging to the estate represented by the administrator, is not void as against public policy.

Contracts—Construction—Public Policy.

2. Courts will not declare a contract void as against public policy, if by any reasonable construction it can be upheld.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by Mathilda Lawson against W. S. Cobban and another. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions.

Mr. M. P. Gilchrist, for Appellant.

Messrs. Lamb & Walker, for Respondents.

MR. JUSTICE SMITH delivered the opinion of the court.

The district court of Silver Bow county sustained a general demurrer to the complaint in this case, which is an action for damages for breach of an executory contract for the sale of real estate, and, in default of further pleading by the plaintiff, entered judgment for the defendants. From that judgment an appeal is taken.

The point to be decided is whether a written agreement by one who signed his name "T. J. Lynde, Adm. Estate of Mary A. Black," and two others, to convey at a future date real estate

not owned by them, but belonging to the estate represented by the administrator, said agreement being founded upon a valuable consideration, i. e., part payment of the purchase price, is void and unenforceable, as against public policy. Professor Page, in his work on Contracts (section 326), says: "Contracts are against public policy when they tend to injure the state or the public. 'Public policy is that principle of law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public or against the public good.'" Many cases are cited by counsel for the respondents which hold that illegal or immoral contracts will not be enforced. Those cases are not in point here. There was nothing immoral or illegal about this contract. Laymen, as well as lawyers, know that property belonging to the estate of a dead man can be lawfully sold and conveyed by complying with the law governing the procedure in such cases, and that it descends to those entitled thereto if not so sold. The contract in this case cannot be construed as an agreement to convey without an order of court. A man can, for a consideration, bind himself by a contract to convey property which he does not own at the time of making the contract. If the parties intend in good faith to carry out the terms of the contract (and there is nothing in the complaint in this case to negative such intention), and not merely to wager on the price of the subject matter at a future date, the fact that the obligors do not at the time of the execution of the contract own the property will not prevent the injured party from maintaining an action for its breach. It is matter of common knowledge that men speculate in real estate, and that persons engaged in the real estate business agree, in their own names, and bind themselves, to convey the property of others. It is to be presumed that before entering into such contracts they make reasonably sure, by agreements with owners or otherwise, that they will be able to get title, or, at least, that the property will be on the market before they are obliged to perform. There is nothing in the complaint in this case to indicate that there was any notion in the minds of the parties of defrauding the

estate. Courts are reluctant to declare contracts void as against public policy, and will refuse to do so if by any reasonable construction the contract can be upheld. A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done, without violating the intention of the parties. (Revised Codes, sec. 5032.)

In the case of *Montana Min. Co.* v. *St. Louis Min. Co.*, 20 Mont. 394, 51 Pac. 824, it was held that an agreement to convey to an adverse claimant a portion of the ground in dispute after patent had been obtained from the United States, was enforceable in equity and not against public policy. "A contract is not invalid, nor is the promisor discharged, merely because it turns out to be difficult, unreasonable, dangerous, or burdensome. Thus one who sells goods to be delivered at a certain time cannot excuse himself by saying that he expected to buy the goods, but could not." (9 Cyc. 625; see, also, *Beebe* v. *Johnson*, 19 Wend. (N. Y.) 500, 32 Am. Dec. 518.)

In the case of *Arentsen* v. *Moreland*, 122 Wis. 167, 106 Am. St. Rep. 951, 99 N. W. 790, 65 L. R. A. 973, the late Chief Justice Cassoday, speaking for the court, said: "The authorities, both English and American, are to the effect that a vendor who agrees to convey what he at the time knows that he has no right to convey, because the title is in another, thereby assumes the risk of acquiring the title and making the conveyance, or responding in damages for the vendee's loss of the bargain. As aptly stated by Judge Cooley: ' * * * Such contracts are speculative in character, and the party giving them understands the risk he assumes when the covenant is entered into.' Such contracts for the future delivery of personal property have frequently been characterized by this and other courts as speculative in character. * * * One of the definitions of 'speculate' is to 'take the risk of loss in view of possible gain.' (Century Dictionary.)"

Of course, the administrator may not personally profit from the estate, but this does not affect the *status* of the obligee in

the contract. The defendants in this case may have been acting for, or in conjunction with, the heirs to the estate, or they may themselves have been heirs. A contract may be explained by reference to the circumstances under which it was made or the matter to which it relates. (Revised Codes, sec. 5036.)

The complaint shows that two contracts were signed contemporaneously. One was signed, "T. J. Lynde, Adm. Estate of Mary A. Black"; the other, "T. J. Lynde. W. S. Cobban. Hayes Cannon." It appears to us, therefore, that the words "Adm. Estate of Mary A. Black" may have been merely descriptive, and that Lynde was not acting in a representative capacity. (See 2 Page on Contracts, sec. 1148.) There is an allegation in the complaint that the defendants were acting "in their personal capacity." There is no express allegation that Lynde was acting in a representative capacity, and we think it may be gathered from the entire complaint that plaintiff intended to aver that he, also, was acting in his personal capacity. But, if we assume that he was acting as administrator, the result in this case is the same. The complaint alleges that Lynde died leaving no estate whatsoever, and therefore no proceedings were ever had looking to the appointment of a personal representative. In the case of *Bauerle* v. *Long*, 187 Ill. 475, 58 N. E. 458, 52 L. R. A. 643, cited by respondents, it was held that an executor, authorized by the will to sell real estate, had no implied power to bind the estate by warranty deed, but only to convey whatever title the testator had, and hence no action could be maintained against him in his *representative* capacity for breach of an executory contract to make a warranty deed. The defendants in that case were sued in their representative capacity. In this case the administrator was not sued at all, his co-obligors being the only defendants.

In the case last referred to the court makes, with approval, the following quotations: "In *Vincent* v. *Morrison*, Breese (Ill.), 227, the administrators undertook to covenant, in a deed of land sold to pay debts of their intestate, that the land was free from encumbrances, and the court say (page 231): 'In relation to

covenants the general rule is that an administrator has no power to charge the effects of the intestate by any contract originating with himself, and it seems from the current of decisions that his contracts in the course of his administration, or for the debts of his intestate render him liable *de bonis propriis'*—citing *Sumner* v. *Williams,* 8 Mass. 162, 5 Am. Dec. 83.

"In *Mason* v. *Caldwell,* 5 Gilm. (Ill.) 196 (48 Am. Dec. 330), the court say (page 207): 'If an administrator or guardian, in his representative capacity, makes a contract or covenant which he has no right to make, and which is not binding upon the estate or ward, he is bound personally to make it good. The rule is well settled that an executory contract of an executor or administrator, if made on a new and independent consideration moving between the promisee and the promisor, is his personal contract, and does not, in the absence of authority given by statute or by will of the decedent, bind the estate.' (11 Am. & Eng. Ency. of Law, 2d ed., p. 932, citing numerous cases.)

"In *Austin* v. *Munro,* 47 N. Y. 360, it is said: 'The rule must be regarded as well settled that the contracts of executors, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, as for services rendered, goods or property sold or delivered, or other consideration moving between the promisee and the executors as promisors, are the personal contracts of the executors and do not bind the estate, notwithstanding the services rendered or goods and property furnished, or other consideration moving from the promisee, are such that the executors could properly have paid for the same from the assets and been allowed for the expenditure in the settlement of their accounts. The principle is that an executor may disburse and use the funds of the estate for purposes authorized by law, but may not bind the estate by an executory contract, and thus create a liability not founded upon a contract or obligation of the testator. (*Ferrin* v. *Myrick,* 41 N. Y. 315; *Reynolds* v. *Reynolds,* 3 Wend. (N. Y.) 244; *Demott* v. *Field,* 7 Cow. (N. Y.) 58; *Myer* v. *Cole,* 12 Johns. (N. Y.) 349.) The rule is too well established in this

state to be questioned or disregarded, and any departure from it would be mischievous.'" See, also, 2 Page on Contracts, sec. 995, where the author says: "Executors are liable personally upon contracts which they attempt to make in their official capacity when they cannot bind the estate, unless they specifically contract against a personal liability"—and cases cited.

The judgment of the district court is reversed, and the cause is remanded, with directions to overrule the demurrer.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

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HOLLINGSWORTH ET AL., RESPONDENTS, *v.* DAVIS-DALY ESTATES COPPER CO., APPELLANT.

(No. 2,571.)

(Submitted November 28, 1908. Decided January 18, 1909.)

[99 Pac. 142.]

Personal Injuries—Death by Negligence—Master and Servant—Mines—Safe Place to Work—Ways—Complaint—Sufficiency.

Personal Injuries—Master and Servant—Defect of Construction—Knowledge of Master—Complaint.

1. Where from the complaint in an action to recover damages for the death of a servant claimed to have been due to the negligence of the master, it appears that an alleged defect in a way, made use of by the defendant's employees, was a defect of construction, an allegation of the employer's knowledge of the defect is not required.

Same.

2. An allegation that defendant's employer negligently permitted a way over an abandoned shaft to become unsafe and dangerous, and negligently left the ground around the shaft loose, unstable, and of inadequate cohesiveness to sustain the weight of an ordinary man, and negligently put good boards across the timbers, thereby inviting the deceased to cross over, was a sufficient averment that defendant had notice of the dangerous condition of the shaft.

Same—Evidence—Admissibility.

3. Evidence that steam was injected through an exhaust pipe into an abandoned shaft, alleged to have been insufficiently timbered and the ground surrounding which negligently "left loose" by defendant company, and in walking over which an employee was killed by falling

into it, was properly admitted under the allegations of the complaint. The effect of steam on the loose ground was competent to be shown.

Same—Opinion—Evidence—Admissibility.

4. A miner, who had testified that he examined the shaft the morning after the deceased fell into it, and could see no evidence of any timbering, was properly allowed to answer a question whether, from his knowledge based upon such examination, he could say whether any timbers were beneath the collar of the shaft on the day before the accident.

Same—Evidence—Custom.

5. The inquiry whether the method pursued by defendant company in making loose dirt and decomposed granite secure around the abandoned shaft was the one commonly used in the community was not objectionable.

Same—Children of Legal Age—Pecuniary Loss by Death of Parent—Instructions.

6. Section 6486, Revised Codes, not limiting the right of recovery for the death of a parent to minors, it was for the jury to say, under the evidence, whether the children of the deceased, both of legal age, suffered damage through the death of their father, and what sum would compensate them; and an instruction to the effect that the jury in arriving at their verdict could not consider any loss of comfort, society or protection of the father was correctly refused.

Same—Knowledge of Defect by Servant—Instructions.

7. In an action to recover for the death of a servant by reason of the negligence of the master in failing to provide him with a safe place in which to work, the question is not whether the deceased had equal means with the master of knowing the conditions existing, but whether, in the light of all the surrounding circumstances, he appreciated the danger; and therefore the refusal of the court to submit an instruction that if the servant had equal means of knowledge with the defendant of the danger, he was guilty of contributory negligence and assumed the risk, was proper.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by Mamie J. Hollingsworth and others against Davis-Daly Estates Copper Company and others. From a judgment in favor of plaintiffs and an order denying it a new trial, the company appeals. Affirmed.

Mr. Charles R. Leonard, and *Messrs. Clayberg & Horsky,* for Appellant.

Where a plaintiff alleges specific acts of negligence in his complaint, he is restricted in his proof of negligence to the acts, facts and specific negligence alleged. (*Pierce* v. *Great Falls & Canada Ry.*, 22 Mont. 445, 56 Pac. 867; *Nolan* v. *Montana Central Ry.*, 25 Mont. 107, 63 Pac. 926; *Kelly* v. *Northern Pac.*

Ry. Co., 35 Mont. 243, 88 Pac. 1009; *Cherokee etc. Co.* v. *Wilson*, 47 Kan. 460, 28 Pac. 178; *Atchison etc. Ry. Co.* v. *Irwin*, 35 Kan. 286, 10 Pac. 820; *Santa Fe etc. Ry. Co.* v. *Hurley*, 4 Ariz. 258, 36 Pac. 216; *Woodward* v. *Oregon Ry. & Nav. Co.*, 18 Or. 289, 22 Pac. 1076; *Waldhier* v. *Hannibal & St. Joseph Ry. Co.*, 71 Mo. 514; *Edens* v. *Hannibal & St. Joseph Ry. Co.*, 72 Mo. 212; *Field* v. *Chicago etc. Ry. Co.*, 76 Mo. 614; *De La Mar* v. *Herdeley*, 157 Fed. 547, 85 C. C. A. 209; *Batterson* v. *Chicago Grand Trunk Ry. Co.*, 49 Mich. 184, 13 N. W. 508; *Lakin* v. *Ry. Co.*, 15 Or. 220, 15 Pac. 641; *Thomas* v. *Georgia etc. Banking Co.*, 40 Ga. 231; *Long* v. *Doxey*, 50 Ind. 385.)

The burden of proof was upon plaintiff to show that appellant was guilty of the negligence alleged, and that such negligence was the proximate result of Hollingsworth's death. The rule of a burden of proof is not satisfied if the evidence discloses that the existence of the facts to be proven rests merely on conjecture. The jury may not arrive at their verdict upon their mere conjecture or guess. This doctrine is so firmly established in the jurisprudence of the United States, and is based on such strong reasons and logic, that any contrary doctrine cannot be considered. It has been announced by this court in the following cases: *Shaw* v. *New Year Mines Co.*, 31 Mont. 138, 77 Pac. 515; *Olsen* v. *M. O. P. Co.*, 35 Mont. 400, 89 Pac. 731; *McGowan* v. *Nelson*, 36 Mont. 67, 92 Pac. 40; see, also, *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 365; *Hansen* v. *Seattle Lumber Co.*, 31 Wash. 604, 72 Pac. 457; *Armstrong* v. *Town of Cosmopolis*, 32 Wash. 110, 72 Pac. 1038; *Hughes* v. *Cincinnati etc. Ry. Co.*, 91 Ky. 526, 16 S. W. 275; *Reidhead* v. *Skagit County*, 33 Wash. 174, 73 Pac. 1118; *Hyer* v. *City of Janesville*, 101 Wis. 371, 77 N. W. 729; *Hayes* v. *Forty Second St. etc. R. R. Co.*, 97 N. Y. 259; *Peterson* v. *Union Iron Works*, 48 Wash. 505, 93 Pac. 1077; *Olmstead* v. *Hastings Shingle Mfg. Co.*, 48 Wash. 657, 94 Pac. 474; *Leonard* v. *Miami Min. Co.*, 148 Fed. 827, 78 C. C. A. 517; *Corcoran* v. *Boston & Albany Ry. Co.*, 133 Mass. 507; *Chandler* v. *New York etc. Ry. Co.*, 159 Mass. 589, 35 N. E. 89; *Manning* v. *Chi-*

cago etc. R. R. Co., 105 Mich. 260, 63 N. W. 312; *Musbach* v. *Wisconsin Chair Co.*, 108 Wis. 57, 84 N. W. 36; *Deschenes* v. *Concord etc. Ry. Co.*, 69 N. H. 285, 46 Atl. 467; *Fitzgerald* v. *New York Cent. & H. Ry. Co.*, 154 N. Y. 263, 48 N. E. 514; *Sorenson* v. *Menasha Paper & Pulp Co.*, 56 Wis. 338, 14 N. W. 446.

Messrs. Maury & Templeman, and *Mr. S. T. Hogevoll*, for Respondents.

A servant does not assume the risks of dangers from a latent defect. (*Salem Stone Co.* v. *Tepps*, 10 Ind. 519, 38 N. E. 228; *Pittsburgh etc.* v. *Woodward*, 9 Ind. App. 169, 36 N. E. 442; *Gutridge* v. *Missouri etc.*, 105 Mo. 526, 16 S. W. 943; *O'Mellia* v. *Kansas etc.*, 115 Mo. 217, 21 S. W. 503; *Soeder* v. *St. Louis etc.*, 100 Mo. 673, 18 Am. St. Rep. 724, 13 S. W. 714; *Benham* v. *Taylor*, 66 Mo. App. 308; *Bailey* v. *Rome etc.*, 139 N. Y. 302, 34 N. E. 918; *Fluhrer* v. *Lake Shore etc.*, 121 Mich. 212, 80 N. W. 23.)

"The master must take into account the properties of such substances as he employs for the purposes of his business and the operation of familiar physical laws upon these substances." (Labatt on Master and Servant, secs. 141, 298, 299.) He is chargeable with knowledge that all instrumentalities deteriorate, more or less rapidly, while they are being used (*Honifius* v. *Chambersburg Eng. Co.*, 196 Pa. 47, 46 Atl. 259); that timber which is constantly kept in a damp condition will be apt to grow rotten (*Malone* v. *Hathaway*, 3 Hun (N. Y.), 553); that banks of earth disintegrate if exposed alternately to a freezing and thawing temperature (*Holden* v. *Fitchburg R.* Co., 129 Mass. 268, 37 Am. Rep. 343; *Deweese* v. *Meramec Iron Co.*, 54 Mo. App. 476; s. c. 128 Mo. 423, 31 S. W. 110).

It is not necessary that all theories inconsistent with negligence be excluded in order that the doctrine of *res ipsa loquitur* may be invoked. (*Clarke* v. *Nassau Electric etc. Co.*, 9 N. Y. App. Div. 51, 41 N. Y. Supp. 78.) When the maxim is properly applicable, the plaintiff does not waive the benefit of the

doctrine by going further and showing affirmatively and specifically an act of negligence. (*Wood* v. *Roxborough*, 12 Montgomery Co. Rep. (Pa.) 155.)

Whenever a sufficient cause of an injury is shown for which the defendant is responsible, that will be deemed the true cause in the absence of any showing that there was another cause. (*Adams* v. *Young*, 44 Ohio St. 80, 58 Am. Rep. 789, 4 N. E. 599; *Milwaukee* v. *Kellog*, 94 U. S. 469, 24 L. Ed. 256.)

Where the defendant's negligence is established, and the evidence only warrants a conjecture as to the plaintiff's contributory negligence, or only warrants a conjecture as to some other proximate cause, a verdict for the latter will not be disturbed. So, also, though there may be even room for an inference that the primary cause of the injuries might have been the plaintiff's own negligence, or some other cause, the latter's right of recovery will not thereby be defeated. (*Shannon* v. *Delwer*, 68 Minn. 138, 71 N. W. 14; *Squires* v. *City of Chillicothe*, 89 Mo. 226, 1 S. W. 23; *Rhyner* v. *City of Menasha*, 97 Wis. 523, 73 N. W. 41; *Geo. Matthews Co.* v. *Bouchard*, 28 Can. S. C. R. 580.)

The fact that the hole into which plaintiff fell was away from the place of work has no significance, for the general duty of persons to use reasonable care to keep the premises reasonably safe for all persons rightfully on the premises, and particularly for persons there by invitation, applies between master and servant. (*Irmer* v. *St. Louis Brewing Co.*, 69 Mo. App. 17; *Boyle* v. *Degnon etc. Co.*, 61 N. Y. Supp. 1043; *Belford* v. *Canada Shipping Co.*, 35 Hun (N. Y.), 347; *Eastland* v. *Clark*, 165 N. Y. 420, 59 N. E. 202, 70 L. R. A. 751.)

MR. JUSTICE SMITH delivered the opinion of the court.

This action was brought by the heirs of William Hollingsworth, Sr., against the Davis-Daly Estates Copper Company and others to recover damages for the death of William Hollingsworth, Sr., claimed to have been caused by the negligence of the defendants.

It is alleged in the complaint that the appellant company was operating the Silver King mine, in Butte, and that Hollings-

worth had been in its employ as a stationary engineer for four or five days prior to October 3, 1906. The allegation of negligence is as follows: "That it was the duty of the defendants, masters of William Hollingsworth, Sr., to use reasonable and ordinary care to the end that the place where they had William Hollingsworth, Sr., working for them, and places where they invited him during his work for them, be reasonably safe and free from danger. That the defendants, a few days before the 3d day of October A. D. 1906, had, on the surface of the said Silver King mine, for the use of the men working for them (of which William Hollingsworth, Sr., was one), erected a toilet-house, where with decency the calls of nature were answered, and said William Hollingsworth, Sr., was tacitly by the defendants invited to use the same and go from his work at defendant's engine to said toilet-room when needful. That the defendants, failing and neglecting their duty as set out * * * herein, negligently permitted the direct way from said engine to said toilet-room to become, and the same was, on October 3 and 4, A. D. 1906, unsafe and dangerous in these respects, to-wit: In the said way, and under the same, there was an old, abandoned, insufficiently timbered, empty shaft, 60 or more feet deep, known for many weeks by defendants to be there. The defendants about a month before the 3d day of October, A. D. 1906, and about three weeks before William Hollingsworth, Sr., came to work there, had negligently timbered this shaft for only two sets (about ten feet) below the surface, and had negligently failed to fill, or timber in, or in any wise support the walls of said shaft below the depth of ten feet from surface, and, the said shaft being in surrounding loose dirt and decomposed granite, the ground for three or four feet on every side of said timbers was negligently by defendants left loose, unstable, and of inadequate cohesiveness to sustain the weight of an ordinary man when walking over the same. Furthermore, the defendants had negligently put good boards, firmly nailed across the said two sets of timbers, sufficient to sustain an ordinary man, and thereby invited William Hollingsworth, Sr., and other servants, to go over the said boards and confide in the strength of the earth around the

same. The defendants had negligently done all of the things in this paragraph mentioned, before William Hollingsworth, Sr., came to work for them, and had negligently permitted the said way to remain in this unsafe and dangerous condition until the death of William Hollingsworth, Sr., as hereinafter set forth. That about 11 or 12 o'clock of the night of October 3 or 4, A. D. 1906, the said William Hollingsworth, Sr., going between the said toilet-room and defendant's said engine, using ordinary care on his part, invited by defendant's covering over the said shaft to walk over the same, was approaching said shaft and within a foot or two of the edge of same, when the earth under him, around said timbering, caved in, and thereby, through the negligence of defendants in thus leaving the said ground insecure, said William Hollingsworth, Sr., was thrown to the bottom of said shaft and killed by the defendants."

The appellant company by its answer denied each of these allegations and alleged, as affirmative defenses: That Hollingsworth had full knowledge of the condition of the shaft and of its dangerous character; that appellant had, prior to the third day of October, 1906 (the date of the death of Hollingsworth), used reasonable care in the repair of the shaft and had placed it in a reasonably safe condition; that it had no notice or knowledge that the shaft had become out of repair or dangerous, until the fourth day of October, 1906; that, if the shaft became dangerous or defective on the evening of the third day of October, 1906, the same was unknown to appellant; that Hollingsworth had full knowledge of the condition of the shaft and the fact that it had become dangerous on the evening of October 3, 1906, and prior to the alleged accident, and told various men working with him for appellant of its condition and advised them to notify appellant thereof immediately on the morning of October 4, 1906, and that, with full knowledge of the dangerous condition of the shaft, Hollingsworth voluntarily continued his work as engineer without any objection, and thereby assumed all risk; that it was not necessary for Hollingsworth to approach the shaft in the performance of his

duties as engineer; that he assumed all risk of danger and accident when he approached the same; that, if he approached said shaft, it was upon his own suggestion and for his own individual purposes, with full knowledge of its dangerous condition, and without any instruction from appellant or necessity in the performance of his duties; that Hollingsworth was killed because of his own contributory negligence. By replication plaintiffs denied all allegations of the assumption of risk and contributory negligence.

Upon the issues thus presented, a trial was had in the district court of Silver Bow county, which resulted in a judgment in favor of the plaintiff and against appellant company and judgments in favor of the other defendants. The appellant company made a motion for a new trial, which was overruled, and it now appeals from the judgment and the order overruling its motion for a new trial.

Upon the trial plaintiffs introduced evidence tending to show: That on October 3, 1906, Hollingsworth, Sr., was employed by the appellant as a stationary engineer in the company's engine-room at the Silver King mine; that appellant had erected a toilet-house near said engine-room for the use of its employees; that under the way to this toilet-house, and about twenty feet from the engine-room, existed a shaft about one hundred feet deep; that, prior to Hollingsworth's going to work for appellant, defendant had retimbered the upper part of the shaft, covering it with boards and dirt; that on the evening of October 3, 1906, at about nineteen minutes to 11 o'clock, Hollingsworth left the engine-room, saying that he was going to the toilet; that the next time Hollingsworth was seen he was discovered dead at the bottom of the shaft; that the shaft had caved from the surface all around the collar, and the timbers below the collar set had fallen into the shaft.

Plaintiffs' witnesses Murphy and Hoadley testified that there were no timbers in this old shaft, except for the upper ten feet; but witness Sutton testified that the shaft had been timbered from the bottom since 1898; that he went down this shaft in

1905, and then covered it up and considered it safe. Plaintiffs also introduced evidence, over appellant's objection, that some few days prior to the third day of October, 1906, appellant had caused the exhaust pipe from its engine to be turned into this old shaft, and that steam condensing therein had a tendency to swell the timber and render the ground soft.

At the close of plaintiffs' testimony, appellant moved for a nonsuit, which motion was overruled. Appellant then introduced evidence tending to show: That the old shaft was not covered when it took possession of the property, but that it at once covered the same with planks; that some time prior to October 3, 1906, appellant's foreman went down the shaft and found it in a safe condition, except as to the first set of timbers; that he made a thorough examination and then bulk-headed the upper part of the shaft with timbers eight inches by eight inches; that he put in one new set and timbered it solid, covering it with two-inch plank. This witness testified that where, in the two top sets, the old timbers were decayed, they were replaced with new timbers; that before the shaft was closed up it was put in good condition; that when the witness went down the shaft it was for the purpose of seeing if it was safe; that the foreman inspected the shaft about 4 o'clock P. M. of October 3, 1906, and found everything was all right.

The learned counsel for the appellant state in their brief that there are three important questions involved in the appeal, as follows, as they claim: (1) The complaint does not state facts sufficient to constitute a cause of action; (2) the record contains no evidence of the negligence alleged in the complaint; (3) the record discloses no evidence that Hollingsworth's death was the proximate result of any negligence or other act of appellant. We shall examine the questions in the foregoing order.

1. It is contended that there is no allegation in the complaint that the defendant had knowledge of the dangerous condition of the shaft. The allegation is that the shaft was old, abandoned and insufficiently timbered. The natural deduction from this allegation is that the shaft was no longer used for the pur-

poses for which it was constructed. It is further alleged that, prior to the time at which Hollingsworth became an employee of the company, the defendant had in a negligent way retimbered this shaft for a distance of about ten feet below the surface, and had negligently failed to fill or timber in, or in any way support, the walls of the shaft below that depth, and had then placed good boards across the top and invited its servants to cross the same. We do not regard this allegation as amounting in any sense to a statement that, having discovered a defect or imperfection in the shaft, the defendant had repaired the same, but rather as an averment of new work upon the shaft in the way of construction, in order that defendant's purpose of making a way across it might be carried out. Viewed in this light, the complaint does not fall within the rule laid down in *Fearon* v. *Mullins,* 35 Mont. 232, 88 Pac. 794, but rather within this rule: Where it appears from the complaint that the defect is a defect of construction, an allegation of the employer's knowledge of the defect is not required. (6 Thompson on Negligence, sec. 7529; *Salem Stone & Lime Co.* v. *Griffin,* 139 Ind. 141, 38 N. E. 411.) But even though we regard the complaint as alleging that the shaft had become defective, the case differs from *Fearon* v. *Mullins, supra.* In that case there was an allegation that defendant knew there was an opening in the porch, but that he had covered it up with light boards, and there the pleader stopped. This court held that the complaint should set out the facts showing wherein the danger consisted, also the causal connection between the defective place and the injury, and should allege that the master had, or ought to have had, knowledge of the efficient cause of the injury.

In the complaint before us there is an allegation that the defendant negligently permitted the way from the engine to the toilet-room to become unsafe and dangerous, and negligently left the ground for three or four feet on every side of the timbers loose, unstable, and of inadequate cohesiveness to sustain the weight of an ordinary man, and negligently put good boards across the timbers, thereby inviting the deceased to cross over.

Mr. Thompson, in his work on Negligence, says that knowledge by the defendant is generally regarded as sufficiently averred by an allegation that the defendant negligently permitted appliances to become defective, and negligently suffered them to remain in a defective condition (6 Thompson on Negligence, sec. 7529, and cases cited), and we adopt this as a reasonable, logical and good rule of pleading in this state.

2. The second claim of the appellant is that there is no evidence in the record of the negligence alleged in the complaint. The allegations of the complaint are quoted above. They are specific. Was it error for the trial court to allow plaintiffs to introduce evidence that steam was injected into the abandoned shaft through the exhaust pipe from the engine, or should that testimony have been excluded as comprehending a ground of negligence not pleaded? We think the testimony was properly admitted. This testimony discloses somewhat of uncertainty as to when the steam was first turned into the shaft. Probably it was after the deceased entered the employ of the appellant. Assume that it was. Plaintiffs allege that the shaft was in surrounding loose dirt and decomposed granite. They then proceed to charge—and this, in the light of the testimony, is the substantial grievance complained of—that the ground for three or four feet on every side of the timbers was negligently left loose, unstable, and of insufficient cohesiveness to sustain the weight of a man. The question of negligence, as arising from the condition in which the surrounding ground was left by the appellant, could only be solved by an inquiry as to what use was to be made of that portion of the property. If, for instance, the place was one that was not thereafter to be used or where no employee had any necessity or was permitted to go, then the same degree of care would, probably, not be required of the defendant in protecting the mouth of the shaft, as would be the case under the conditions disclosed by this record. Plaintiffs particularly allege that deceased was invited to confide in the strength of the earth about the shaft. If the shaft had been in solid granite, the action of the steam would probably

have had no effect upon it. The jury had a right to determine whether the appellant was in fact negligent in leaving the earth about the shaft in the condition pleaded, in view of the location of the shaft with reference to other parts of the plant and the use to which the same was to be put. They might well have decided that, if appellant contemplated turning steam into the shaft, it was its duty to first put the loose ground about the collar of the shaft in such condition as that it would not be affected by the action of the steam. This consideration accentuates the importance of the allegation that the ground was by the defendant negligently "left loose" before Hollingsworth was employed.

The case of *Freeman* v. *Sand Coulee Coal Co.*, 25 Mont. 194, 64 Pac. 347, presents practically the same principle as that involved in this case. The plaintiff in that case alleged that the roof of a coal mine was unsafe and liable to fall and that the defendant negligently failed and neglected to brace or prop the same. The evidence showed that, while an engineer's assistant was engaged in cutting out a piece of slate from the roof, with a pick, in order to find substance sufficiently solid to hold a plug, he knocked a prop out from under the piece of slate upon which he was at work, "and the whole thing came down." This court said: "It was for the jury to find from the evidence whether or not negligence of the defendant in leaving the roof in an unsafe condition, concurrently with the act of the assistant, caused the caving in of the roof to the injury of plaintiff; and we think that the allegations of the complaint would support a finding that negligence of the defendant was a proximate cause,—if the jury should believe the evidence sufficient to warrant them in arriving at such a conclusion. * * * It was for the jury to determine whether the defendant might, from knowledge of the condition of the roof, have reasonably anticipated, or with the exercise of reasonable care and prudence might have known, that the roof was in such a condition as to give it reasonable grounds for anticipating the very consequence which did happen concurrently with the attempt to place the

plugs, and it was error for the court to confine the jury to consideration of the single question whether 'the condition of the roof was such that it was in fact likely to fall of its own weight unless braced so as to support it.' "

We are also of opinion that any testimony that tended to prove that the earth, as left by the appellant about the collar of the shaft, was loose, was competent testimony, and, if that fact could be proved by showing the effect of the steam that was actually injected into the shaft, then plaintiff was entitled to make such proof. The turning in of the steam was one of the circumstances surrounding the matter under investigation and tending to substantiate the allegation that the defendant "negligently permitted the said way to remain in this unsafe and dangerous condition until the death of William Hollingsworth, Sr."

3. Does the record contain any evidence that Hollingsworth's death proximately resulted from any negligent or other act of the appellant? Under the above interrogatory, it is argued that there is no evidence that the acts of the appellant, alleged and proven, were the proximate cause of Hollingsworth's death. The principle invoked in the following cases is confidently relied on, viz.: *Shaw* v. *New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515; *Olsen* v. *Montana Ore Pur. Co.*, 35 Mont. 400, 89 Pac. 731; *McGowan* v. *Nelson*, 36 Mont. 67, 92 Pac. 40; *McAuley* v. *Casualty Co.*, 37 Mont. 256, 96 Pac. 131. And a somewhat analogous principle is also found in the case of *Howie* v. *California Brewery Co.*, 35 Mont. 264, 88 Pac. 1007, which was not a negligence case. Those cases, however, are in their facts clearly distinguishable from this case. In the Shaw Case, the plaintiff claimed that the accident was caused by the explosion of blasting powder left in a hole in the mine by direction of defendant's foreman, of the existence of which deceased had no knowledge. It was held that there was no testimony to show that that charge of powder caused the explosion. In the *Olsen Case*, there was no testimony to connect the defendant company, or any of its officers, with the explosion of powder which caused

the death of plaintiff's intestate, and no testimony as to who in fact exploded the powder, or how or why the explosion took place. In the *McGowan Case,* the court said: "From the foregoing statement of plaintiff's evidence, it will be seen that no testimony was offered showing how the accident occurred. The planks fell, but there was no testimony as to how they happened to fall—whether by reason of the negligence of the defendants in allowing them to be improperly piled or piled in an unsafe place, or in an unsafe or dangerous manner, or by reason of the negligence of some fellow-servant of the plaintiff in handling the planks." The *McAuley Case* was founded in contract. Plaintiff's wife was insured against injuries effected solely through external, violent, and accidental means which should, directly and independently of all other causes, result in loss of life, and he was unable to prove the exciting cause of the action of the erysipelas that resulted in her death. In the *Howie Case,* the defendant was sued in trespass for tearing down a wall alleged to have been situated upon plaintiff's land. Plaintiff was unable to prove where the wall stood, and, of course, he failed in his action.

Numerous cases from other states are also cited in which the principle laid down in the Montana cases is applied, but in some of these latter cases, as we think, the facts presented did not warrant the conclusion reached by the court; but in this case we cannot agree that the relation of cause to effect is wanting, or that it is one of those instances where the testimony is equally consistent with the existence or nonexistence of negligence on the part of the defendant. We venture to say this, because there is practically no dispute as to the physical conditions existing about the mouth of the shaft before and after Hollingsworth left the engine-room. The shaft was about twenty feet from the engine-room, and the closet was about the same distance from the shaft. The plank flooring was covered with dirt, and all of the men employed there were in the habit generally of walking over it, following a trail from the engine-room to the closet. About 11 o'clock, on the night in question, deceased,

who was a sober, industrious man, forty-seven years of age, left the engine-room, saying he was going to the toilet. He never returned. Upon search being made for him, it was discovered that the ground about the shaft had begun to give way, and steam was arising from it in two places. The next morning it had the appearance of a funnel-shaped hole twenty or thirty feet across, all around, looking "as though it had given down in a funnel shape; that what had been sustained granite had caved in." Prior to 10:30 o'clock on the night in question, the ground around the shaft was in apparently good condition, but at about that hour one of plaintiffs' witnesses saw it. The following is a part of his testimony, in narrative form: "That the steam was blowing out there, and the wind was blowing it from the north; that he (witness) jumped over the hole; that he couldn't see it before he got to it on account of the steam; that he had not seen steam coming up in that locality before that night that he knew of; that he did not go into the same hole Hollingsworth went into the following morning, but that he could see into it; that he could see fifty or sixty feet down (the following morning); that (at 10:30 P. M.) there was a hole on the south side of the shaft; that it was a dark night, as well as he could remember, but he couldn't tell much about it there, as there was so much electric light close to the glass that it was blacker than,—he couldn't say what; that the only light he could find was the engineer's electric light, and when he left the engine-room he walked out in the darkness with the light behind him in the engine-room, in one window, and that was sixteen-candle power; that he got within about three feet of the shaft before he saw the steam; that when he returned by another route to the engine-room, he said, 'Boys, if any of you go out to the toilet to-night, look out for that darn thing' (he does not recall who was there at the time); that he found the hole on the north side of the shaft; that he jumped the hole on the south side, or he would have gone down where Hollingsworth did; that he didn't see any hole on the south side, but that he jumped and missed that hole on the south side; that he didn't see any hole

on the south side, but there was one there in the morning; that he found a hole on the north side, but he didn't know whether it was a hole or not; that he thought it was a slip like a man would make when the timbers were caving in a little when the ground is settling." When he returned to the engine-room, Hollingsworth was not there. There was testimony on the part of the defendant that Hollingsworth said he knew the ground about the shaft had caved, having been so informed by the pump-man, and that he told others to be careful and said the matter must be reported to "the boss" in the morning. This testimony, however, was of such a nature, viewed in the light of the cross-examination of the witness and the testimony of other witnesses, that the jury may not have believed it. There was also testimony introduced by both sides that the caving in was gradual; the holes enlarging with the passage of time. The night was sufficiently dark to make it necessary, or at least advisable, for the employees to carry a lantern or candle in order to see about them. About 8 o'clock the following morning the body of Hollingsworth was found at the bottom of the shaft. He was dead. There was no testimony of any marks or injuries upon the body. For several days prior to the death of Hollingsworth steam had been continuously injected into the shaft through the exhaust pipe, which was eighteen inches under the ground, and there was testimony that such steam, condensing upon or about loose ground, would have a tendency to make it drop down into the shaft. A witness testified that he had never seen steam arising from about the collar of the shaft before that night, and that a box or ventilator had been constructed through which the steam found its way to the surface. This witness also testified that he had a light and could see the steam arising; but, he said, if he had had no light, he could not tell whether he could have seen the steam or not. Hollingsworth was employed at the engine-room when the exhaust pipe was laid into the shaft.

We are of opinion that the jury were justified in finding, from the foregoing testimony, that Hollingsworth accidentally fell into the shaft, and that the opening into which he fell was

caused by the negligence of the defendant in allowing the ground about the collar to be in such a loose condition that it would not sustain the weight of a man, that it caved by reason of the action of the steam upon it, and that in attempting to pass across it Hollingsworth fell to his death. No conjecture or speculation is necessary to reach this conclusion, but, on the contrary, the jury would have been obliged to go outside the testimony and into the field of conjecture to reach any other. Neither was it necessary, under this testimony, to choose between different theories as to how death might have been caused. Whether the hole into which deceased fell was made by his own weight, or was there before he attempted to cross, is not material to the inquiry into this feature of the case. Ordinary knowledge and experience, applied to the testimony, would lead any reasonable man to believe just as this jury believed. The question for them to decide was: Does the testimony disclose an efficient cause of death, reasonably deducible from the circumstances proven, exclusive of any other cause inferable from or suggested by this same testimony? The jury found that it did, and we think the testimony was sufficiently substantial and definite in character to justify the finding.

4. Other less fundamental errors are assigned:

(a) Plaintiffs' counsel asked their witness Murphy this question: "Mr. Murphy, can you say whether, basing your knowledge, if you have any knowledge, on your examination of that shaft on the morning of the accident, can you say whether any timbers were beneath the collar of the shaft on the day before?" Counsel for appellant objected to the question being answered unless it was first shown that witness had knowledge of the condition before the accident. The answer was: "Well, from the condition of the shaft, as I saw it, any miner of any experience at all would say that you couldn't see where there were any timbers outside of the collar set." Murphy was a miner. His answer amounts to a statement that he saw no evidence of any timbers below the collar set and no evidence of any having been there the day before. This witness had already testified, with-

out objection, that when daylight came he could see into the shaft distinctly, that he could not see any timbering at all, that "there was none whatever," that he never found any timbering at all below the collar set, that from what he could see there were no timbers in the shaft, that he was standing on the rim of the shaft, and could see "possibly to the bottom of it." In the light of this testimony, we see no error in the ruling of the court in any view of the competency of the question to which exception was taken.

(b) The foregoing also applies to the ruling of the court in allowing Murphy to testify that, from the appearance of the shaft the next morning, he would say that there had been no timbers beneath the collar set.

(c) This same witness was asked: "What method, if any, is known and used in this community to make dirt and rock around the empty space of the shaft sustain it?" Counsel objected to the question on the ground that it was incompetent under the pleadings in the case, and for the further reason that the witness had testified that he did not know anything about the condition of the shaft until the next morning. The court overruled the objection, and the witness answered: "Well, in such cases, where you have to protect a shaft there, they usually use heavy plank and logging and run it all the way around." We doubt whether the objection was so stated to the trial court as to put it in error in any event, but we find it argued in the brief and will consider it. Counsel contend: "The rule is, did the defendant exercise reasonable care in the repair of the shaft to make it reasonably safe, and not what the method was in use in the community to make the dirt and rock around the empty space of the shaft sustain it. It is no matter what method is usually employed, if the method pursued by the appellant discloses the fact that it used reasonable diligence to protect the shaft from caving and render it reasonably safe." But the question to be decided was: Was the method employed by the appellant reasonably safe? In the case of *Boyce* v. *Wilbur Lumber Co.*, 119 Wis. 642, 97 N. W. 563, the court said: "Inasmuch as negligence

ordinarily consists simply of lack of ordinary care, and ordinary care is that care which the great majority of people are accustomed to exercise under the same or similar circumstances, it was, in substance, held in *Guinard* v. *Knapp-Stout & Co. Company*, 95 Wis. 482, 70 N. W. 671, that in determining whether an employer was negligent in furnishing an unsafe place to work, because of the proximity of uncovered machinery, the test was whether the defendant had come up to the standard of employers generally in the same business and under similar circumstances, and this test has been approved several times since that decision was rendered."

Mr. Labatt, in his work on Master and Servant (section 52), has this to say: "The courts not infrequently employ language which, if taken literally, would seem to embody the doctrine that nonconformity to common usage implies negligence, as a matter of law. But an examination of the cases in which expressions of this sort occur will show that they merely amount to somewhat loose statements of a rule which may be enunciated more accurately as follows: The master's negligence is a question for the jury whenever it is warrantable to infer from the evidence that the injury would not have been received if a certain instrumentality or method had been substituted for that actually adopted by the defendant, and that this alternative instrumentality or method was one commonly used by other employers in the same line of business under similar circumstances. This rule is applied both by the courts which do, and by the courts which do not, accept the doctrine that conformity to common usage is a conclusive defense." We think this rule, as gathered from the decisions and restated by the author, is reasonable and logical, and adopt it as the law of this state. See cases cited to support the text, and, also, 6 Thompson on Negligence, section 7882, and cases cited.

(d) Instruction No. 6, given by the court, is as follows: "Gentlemen of the Jury: If under all of the evidence and all of the instructions your verdict is for the Hollingsworth heirs and against the defendant company, then it will be your duty to

assess and write into that verdict the amount of damages which plaintiffs have sustained, if any. Before going into any such question, I charge you that there are no facts or circumstances proven in this case which would permit you to give or allow any damages as an example or to punish the company. The law reads that, if your verdict be for the heirs of Hollingsworth, you may allow such damages as under all of the circumstances of the case must be just. In that case it would not be just to allow more than compensation; that is to say, payment for the financial loss which they have sustained by reason of his death. But under the head of compensation (if your verdict is for them) you may consider any amount which Hollingsworth, Sr., would probably have earned during his life (if not cut off) and contributed to his wife and children. You may in this connection consider his capacity to earn money, his age at death, his disposition to work, his habits of life and living, and his own expenditures. In connection with the probable expectancy of life of Hollingsworth, Sr., you may also consider the age and expectancy of life of his wife with relation to his own age. You should bear in mind another matter (if your verdict is for his heirs) when you come to the consideration of allowing payment for the future earnings and contributions of the dead man. Simply multiplying his expectancy by his yearly contribution from earnings would be excessive, and not as reliable as determining what would buy with some responsible life insurance company a yearly income equal to what he would earn and contribute to them during the joint expectancy of himself and all and any of his heirs, and leave nothing at the death of any as to the allowance made on account of such as would have died before he would have died. If your verdict is for the plaintiffs, you may consider any loss of comfort, society, or protection of a father and husband, and in that case, if it was of money value, you may allow pecuniary compensation. In other words, if your verdict is for them, you must give such damages as will fully compensate them, both wife and children, for the pecuniary value to them of the life of the husband and father. Sympa-

thy and pity must not influence you in a verdict. Neither a desire to help the plaintiffs nor to punish the defendant should be exercised."

Because the record discloses that at the time of the trial both children were of legal age, appellant contends that "they were not entitled to further support from the deceased, as a legal obligation on his part, and there is no method whereby we can ascertain what, if any, damages were allowed by the jury for said children in this charge." The statute provides (section 6486, Revised Codes) that an action for death of an adult caused by the wrongful act of another, may be maintained by the heirs or personal representatives. Section 3751, Revised Codes, imposed upon the father of any poor person, who is unable to maintain himself by work, the duty "to maintain such person to the extent of their ability." The phraseology is that of the legislature. The evidence shows: That Hollingsworth was very kind and affectionate toward his children and spent his leisure time at home with his wife and them; that the daughter had been sick for about a year immediately before his death, and deceased was kind and loving to her during that time, and he "never left her for a moment except while at work"; that the son "is hardly able to take care of himself, is learning a trade, and gets small wages." In view of this testimony and the fact that our statute does not limit the right of recovery to minor children, it cannot be said that there was no proof that the children of deceased had suffered damage, and, if they were entitled to any damages at all, it was for the jury to say what sum would compensate them. (See *Redfield* v. *Oakland Consolidated St. Ry. Co.*, 110 Cal. 277, 42 Pac. 822, 1063.)

(e) The trial court struck from defendant's offered instructions relating to the defenses of contributory negligence and assumption of risk the words "or had equal means of knowledge with the defendant thereof," that is, of the dangerous condition of the shaft, and this is assigned as error. There are two phases of this matter to be considered. Instruction 12, as given, illustrates the points involved. It reads as follows: "If you

find from a preponderance of the evidence that the surface ground around said shaft, or on the north and south sides thereof, had caved in on the evening of the 3d of October, 1906, and at a time prior to the precipitation of William Hollingsworth, Sr., into said shaft, as alleged in said complaint, and that said William Hollingsworth, Sr., knew of said caving and the dangerous condition of said shaft, it was his duty not to approach said shaft until defendant had a reasonable opportunity to repair the same and make it reasonably safe; and if you find from a preponderance of the evidence that William Hollingsworth, Sr., approached said shaft, as alleged in said complaint, under the above circumstances, he is charged with contributory negligence, and your verdict must be for the defendant."

The court told the jury that, if Hollingsworth knew of the caving and the dangerous condition of the shaft, it was his duty not to approach it, and, if he did approach it with such knowledge, plaintiffs could not recover. The record shows that Hollingsworth was about the premises at the time the steam pipe was laid into the abandoned shaft, and we shall assume that he knew it was there and the use to which it was put. In addition to the foregoing, defendant's witness Goff testified that Hollingsworth said he actually knew of the cave-in about the shaft, and, if what Goff said was true, Hollingsworth understood and appreciated the danger; but the jury may not have believed Goff, and evidently, considering the charge of the court and the verdict, did not. Without his testimony there is nothing in the record to indicate that Hollingsworth knew the danger arising from the fact that the ground had actually caved in. It remains to be determined, then, whether, assuming that Hollingsworth did not actually know of the cave-in, the same duty rested upon him to appreciate the situation as rested upon the defendant. It was the duty of the defendant corporation to use reasonable care to furnish and provide for its employees a reasonably safe place to work. It was the right of the servant to assume that the master had discharged this duty. So far as this particular case is concerned, this discussion is not very

pertinent, and therefore of little value, because there is no testimony in the record showing that Hollingsworth had any knowledge of the loose and unstable condition in which the ground about the collar of the shaft had been left by the defendant. Without this information, the knowledge that steam was being exhausted into the shaft would convey to him no idea that the surface of the ground could be in any way affected by the action of the steam. As the servant owes no duty to the master with regard to the place of employment, but is chargeable with the duty of performing his work, the question, in cases like this, is not whether he had equal means with the master of knowing the conditions which existed, but whether, in the light of all the surrounding circumstances, he appreciated the danger. (*Stephens* v. *Elliott*, 36 Mont. 92, 92 Pac. 45; *Forquer* v. *Slater Brick Co.*, 37 Mont. 426, 97 Pac. 843; *Hardesty* v. *Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29.)

(f) What has heretofore been said disposes of the questions raised by the appellant based upon the court's refusal to give its proposed instructions numbered 20, 21 and 22.

(g) Complaint is made that the trial court refused to submit to the jury for answer several interrogatories prepared by the appellant. District courts may in all cases direct the jury to find a special verdict in writing upon any or all of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon; but in no case shall special issues be submitted when, in the opinion of the court, a general verdict would be sufficient. (Revised Codes, sec. 6758.) We do not here determine whether or not error may ever be predicated upon the refusal of the trial court to submit special questions to a jury for determination; but we have no hesitancy in saying in this case, assuming that it was the duty of the court to exercise a sound legal discretion in the matter, that no abuse of discretion is disclosed by the record.

(h) The foregoing discussion disposes of all errors assigned and argued in the briefs of counsel, including those founded

upon the refusal of the court to grant appellant's motion for a nonsuit and its action in entering judgment on the verdict and refusing to grant a new trial.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. HAPPEL, PLAINTIFF, *v.* DISTRICT COURT, DEFENDANT.

(No. 2,629.)

(Submitted November 30, 1908. Decided January 18, 1909.)

[99 Pac. 291.]

Mandamus—Divorce — Decree — Setting Aside — Action — Assumption of Jurisdiction—Summons—Service—Guardians ad Litem—Appointment—Discretion.

Insane Persons—Divorce—Summons—Personal Service.

1. In order to clothe the district court with jurisdiction in a suit for divorce brought by the wife against her insane husband, summons must have been served upon the latter personally. (Revised Codes, sec. 6519, subsecs. 5, 7.)

Judgments—Setting Aside.

2. Though a judgment void on its face may be set aside on motion at any time, this may not be done where the judgment is fair on its face, the infirmity of which must be made to appear by evidence *dehors* the record.

Same.

3. The power of the district court to vacate or modify a judgment fair on its face ceases at the expiration of six months after its entry.

Same—Divorce—Setting Aside—Failure to Pursue Remedies—Independent Suit.

4. Where an appeal from a decree awarding a divorce to the wife of an insane husband, claimed to be void by reason of nonservice of summons on the defendant personally, would have been of no avail because the defect in the service of summons did not appear in the record, and even though a motion to vacate the decree, fair on its face, was not made within six months from its entry, the daughter of the incompetent was not precluded from thereafter bringing an independent suit, as next friend, to have the decree set aside, his general guardian having refused to act.

Same—Motion to Set Aside—Statute—Applicable to Judgments and Decrees.

5. There being no distinction between judgments at law and decrees in equity, except as to the character of relief granted by them, section 6589, Revised Codes, authorizing vacation of judgments fair on their face, within a reasonable time not exceeding six months, applies to both, subject to the rule that a court of equity will not interfere so long as there is another subsisting adequate remedy.

Divorce—Decree—Vacation—Summons—Defective Service.

6. A decree of divorce, secured without personal service of summons on a defendant insane person, may be vacated, the same as any other judgment, for want of jurisdiction in the court to render it.

Insane Persons—Divorce—Guardians *Ad Litem*—Appointment—Discretion—*Mandamus*.

7. The daughter of her insane father filed on his behalf, as next friend, a complaint demanding judgment that a decree of divorce, granted to the wife of the incompetent, be set aside because personal service of summons had not been made upon him, and asked that the court appoint a guardian *ad litem* to prosecute the action, his general guardian having refused to act. This request was refused on oral objection. *Held*, on application for writ of mandate, that conceding that the power of the district court to appoint a guardian *ad litem* is discretionary (Revised Codes, sec. 6481), such discretion does not extend to a refusal *in limine* to make the appointment and assume jurisdiction, when a *prima facie* right to prosecute the action is made to appear.

District Courts—Discretion—When Put in Motion.

8. Before a district court can exercise judicial discretion, there must be facts and circumstances to put it in motion.

Mandamus—Actions—Assumption of Jurisdiction.

9. *Mandamus* lies to compel a district court to assume jurisdiction of an action, where, through an erroneous determination of a preliminary question of practice or procedure, the court refused to act, and no other remedy was available.

PETITION by the state on the relation of Hattie F. Happel for *mandamus* to district court of the ninth judicial district in and for Gallatin county. Writ issued.

Mr. John A. Luce, for Plaintiff.

Messrs. Walrath & Patten, for Defendant.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Mandamus. Henry F. Toepper and Albertine Toepper, husband and wife, resided in Gallatin county. On November 16, 1901, Henry F. Toepper was by the district court of said county adjudged insane, and committed to the custody of the state contractors for the care of the insane, in the insane asylum at Warm

Springs, Deer Lodge county. This judgment has never been reversed or set aside, and the said Toepper has been since the date mentioned, and still is, confined in the asylum. On April 10, 1907, Albertine Toepper, being still a resident of Gallatin county, brought her action in the district court of that county to secure a decree of divorce from her husband, the ground therefor alleged in her complaint being cruel treatment by her husband. Accompanying the complaint was an application for the appointment of a guardian *ad litem* to make defense to the action, the application alleging that said Toepper had been adjudged insane and that he was a proper party defendant. The summons issued in this action was never served on the defendant Toepper. The court, however, appointed a guardian *ad litem,* and summons was on April 15 served upon him. This was the only service ever made. On April 22 the guardian appeared in the action for the defendant by filing a demurrer to the complaint. On May 31 the demurrer was overruled. On June 15 the default of the defendant for want of answer was entered. On the same day, upon evidence submitted by the plaintiff, the court decided that she was entitled to the relief demanded, and rendered and caused to be entered a decree in accordance with its decision. No proceedings were instituted by anyone on behalf of the defendant to set aside the decree, until the action was brought out of which this proceeding grew, Charles Papke, his general guardian, appointed subsequent to the entry of the decree, refusing to take any steps in the matter. On April 3, 1908, the plaintiff herein, the daughter of Toepper, filed a complaint as next friend of her father, setting forth the facts above recited, naming Albertine Toepper defendant therein, and demanding judgment that the decree of divorce be set aside on the ground that the same had been entered without jurisdiction. Accompanying the complaint was an application alleging that the general guardian had refused to bring the action, and asking that a guardian *ad litem* be appointed to prosecute it on behalf of her father. Summons having been issued and served upon Albertine Toepper, counsel for plaintiff

herein brought her application for the appointment of a guardian to the attention of the court. The defendant had, in the meantime, appeared by counsel and interposed a demurrer to the complaint on several grounds, among them that it did not state facts sufficient to constitute a cause of action. Counsel for Albertine Toepper orally objected to the appointment of a guardian. The ground of the objection does not appear, nor was any evidence submitted in support of it. Thereafter, on May 4, 1908, the court made an order refusing to make the appointment. Thereupon the plaintiff filed a verified petition in this court, embodying a statement of all the foregoing facts and proceedings, and praying for a writ directing the district court to assume jurisdiction by the appointment of a guardian to prosecute the action instituted by her. In response to notice of the application, the Honorable W. R. C. Stewart, judge of the district court, filed his verified answer admitting the truth of the statements set forth in the petition, but denying the legal conclusion stated therein, that, by his action in refusing to appoint a guardian to prosecute the action of *Toepper* v. *Toepper*, he wholly denied Henry F. Toepper his day in court to submit and have his rights determined with reference to the action of divorce wherein the decree was entered against him.

The demurrer was not submitted to, nor were the questions raised by it determined by the court. The theory upon which the order refusing to appoint the guardian was made, was that the application was addressed to the discretion of the court, and that, in refusing to appoint the guardian and allow the cause to proceed, no substantial right was denied to Henry F. Toepper. That this was the court's theory is apparent from the answer filed to the petition in this court, and the contention made by counsel at the argument that its action was justified by the fact that no showing of special circumstances was made by plaintiff to move the court's discretion.

Though the petition alleges that the decree in the action for divorce is void, it is not in fact so upon the face. Summons should have been served upon the defendant personally. (Re-

vised Codes, sec. 6519, subds. 5, 7.) Under a similar statute in California, it is held that the court has no jurisdiction to appoint a guardian *ad litem* for an incompetent defendant until he has been brought into court by personal service of summons (*Sacramento Savings Bank* v. *Spencer,* 53 Cal. 737; *Redmond* v. *Peterson,* 102 Cal. 595, 41 Am. St. Rep. 204, 36 Pac. 923), and this seems to be the rule generally (*Taylor* v. *Lovering,* 171 Mass. 303, 50 N. E. 612; 22 Cyc. 1236). But it is not necessary to pursue the inquiry as to the order of procedure in such cases. In any event, under either of the provisions of the statute, *supra,* personal service upon the incompetent was necessary to confer jurisdiction to proceed to decree. But while all this is true, in view of the presumptions which must be indulged in favor of the decree, upon the facts alleged, it is voidable only. Nothing appearing to the contrary, we must presume that the complaint upon which it is based states a cause of action, for we may not presume that the decree would otherwise have been granted. This being so, and there having been an appearance thereto by demurrer on behalf of the defendant, the decree is upon its face valid. The summons with the return thereon is no part of the judgment-roll in such cases. (Revised Codes, sec. 6806, subd. 2.) Hence there is nothing upon the face of the record to reveal any infirmity; for this provision does not require the summons with proof of service to be made a part of the record in any case, other than those falling within the exception stated, and the exception does not include this case. Under these circumstances, whether this court should grant the relief demanded by the plaintiff depends upon the solution of two questions: (1) Does an action in equity lie in favor of Toepper to set aside the decree, and, incidentally, does it rest entirely within the discretion of the district court to say, *in limine,* whether he may bring and prosecute it? And (2) is *mandamus* the proper remedy?

1. That such an action lies, under the circumstances existing here, we have no doubt. Not only is there no other adequate remedy, but in fact no other remedy. Assuming, as we must,

that the decree is valid on its face, an appeal, though it lay at the time application was made for the appointment of the guardian *ad litem* by plaintiff, could not be effective, for the reason that the defect in the service of summons does not appear from the record. Nor could relief be had by motion in the district court, for the same reason; for, though a judgment void on the face may be set aside on motion at any time (*Palmer* v. *McMaster*, 8 Mont. 186, 19 Pac. 585; *Harvey* v. *Whitlatch*, 2 Mont. 55; *State ex rel. Johnston* v. *District Court*, 21 Mont. 155, 69 Am. St. Rep. 645, 53 Pac. 272; *State ex rel. Cope* v. *Minar*, 13 Mont. 1, 31 Pac. 723; *People* v. *Greene*, 74 Cal. 400, 5 Am. St. Rep. 448, 16 Pac. 197; *Ex parte Crenshaw*, 15 Pet. 119, 10 L. Ed. 682; *People ex rel. Hart* v. *District Court*, 33 Colo. 405, 80 Pac. 1065; 1 Freeman on Judgments, 98), this rule does not apply to judgments fair on their face, the infirmity of which must be made to appear by evidence *dehors* the record. Under the statute (Revised Codes, sec. 6589), the motion in such cases must be made within a reasonable time after the date of the entry of judgment, but in no case exceeding six months, and the statute is the limit of the court's power in such cases. After the expiration of the time limit fixed therein, the power of the court over the judgment absolutely ceases, and it is without jurisdiction to vacate or modify it. (*Canadian & Am. Mortgage & Trust Co.* v. *Clarita Land & Investment Co.*, 140 Cal. 672, 74 Pac. 301; *People ex rel. Schwartz* v. *Temple*, 103 Cal. 447, 37 Pac. 414; *Young* v. *Fink*, 119 Cal. 107, 50 Pac. 1060; *Schwarz* v. *Oppenheimer*, 90 Ala. 462, 8 South. 36; *People ex rel. Hart* v. *District Court*, 33 Colo. 405, 80 Pac. 1065; 23 Cyc. 907.) Toepper, therefore, has no remedy by motion. Is he to be denied relief because he did not proceed under the statute within the six months? We think not. While it might with propriety be said that, if the action had been brought within the six months, relief should have been denied on the ground that he had an existing adequate remedy at law, the fact that proceedings were not taken in his behalf under the statute is not a conclusive reason why relief should be denied him now. In

Bibend v. *Kreutz et al.*, 20 Cal. 110, in considering a condition similar to that presented here, Mr. Justice Cope said: "The assistance of equity cannot be invoked so long as the remedy by motion exists; but when the time within which a motion may be made has expired, and no laches or want of diligence is imputable to the party asking relief, there is nothing in reason or propriety preventing the interference of equity." He quotes from Story's Equity Jurisprudence, section 885, with approval, as follows: "In general, it may be stated that in all cases, where by accident, or mistake, or fraud, or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere and restrain him from using the advantage which he has thus improperly gained."

In this state the statute applies to judgments at law as well as decrees in equity. No distinction is made between them, except as to the character of relief granted by them. They are both judgments within the meaning of the statute. (*Raymond* v. *Blancgrass*, 36 Mont. 449, 93 Pac. 648, 15 L. R. A., n. s., 976.) And whether the application for relief be denominated, technically, a bill of review or an original bill in equity, the relief will be granted against them subject to the rule that a court will not, in the exercise of its equity power, interfere so long as there is another subsisting adequate remedy. As has heretofore been pointed out, relief cannot be had under the statute; nor is there any remedy other than an action in equity. *Certiorari* will not avail, because the defect of jurisdiction does not appear upon the face of the record. If it did, the judgment would be void upon the face of it, and it would be open to attack by motion invoking the power of the court to clear its record of that which purports to be a judgment, but which is in fact not such.

We do not see that a decree of divorce rests upon any other or different ground than any other judgment determining the property or personal rights of the defendant, when it has been

obtained as it seems was the decree in this case. The courts and text-writers make no distinction. (Freeman on Judgments, sec. 489; *Johnson* v. *Coleman*, 23 Wis. 452, '99 Am. Dec. 193; *Newcomb's Exrs.* v. *Newcomb*, 13 Bush (Ky.), 544, 26 Am. Rep. 222.) While here the attack upon the decree is direct on the ground of a want of jurisdiction (*Burke* v. *Interstate S. & L. Assn.*, 25 Mont. 315, 87 Am. St. Rep. 416, 64 Pac. 879), and that in the case of *Newcomb's Exrs.* v. *Newcomb* was collateral, the remarks of the court in that case, involving, as it did, a decree of divorce obtained without notice, upon the right of a defendant to be heard before he is finally concluded, are pertinent here: "Everyone whose rights are to be affected by a judicial proceeding must have his day in court. This is one of the fundamentals of the law, and, when a judgment has been rendered without citation or summons, there must be some remedy afforded the party complaining." The principle embodied in this statement has been enforced by this court, though in proceedings of a different nature. (*State ex rel. Gemmell* v. *Clancy*, 24 Mont. 359, 61 Pac. 987.) It is not necessary to cite authorities in support of it.

It is not our purpose here to discuss the character of the allegations necessary to be made in order to obtain relief in this or any other character of case. The questions touching the sufficiency of the complaint filed by the plaintiff in the district court are not before us, because the demurrer was never submitted to nor decided by that court. It decided *in limine*, upon the oral objection of the defendant named therein, that it would not appoint a guardian and assume jurisdiction to determine the case on the merits. As we have seen, resistance is made to the granting of any relief by this court, by the assertion of the proposition that it rested in the discretion of the court or judge to allow the case to proceed. And this brings us to the consideration of the incidental question, whether this assertion is correct.

It cannot be doubted that if Henry F. Toepper were *sui juris*, he would have the absolute right to bring his action to have the

decree vacated. The court would not be permitted to reject his application *in limine,* without hearing, either upon the sufficiency of the facts stated, or after issue made, upon the sufficiency of the evidence tendered by him in support of the case made by his pleading. Can it be said that because he has become a helpless incompetent his rights may be taken away without notice, and that he may not thereafter be heard to complain because the judge of the court to which he happens to apply has an exclusive discretion vested in him by law to deny the right, and that, too, without the statement of any pertinent fact or circumstance invoking such discretion? An incompetent, whether plaintiff or defendant, must appear either by his general guardian, or, in case he has none or the guardian fails or refuses to appear, by a guardian *ad litem* appointed by the court. (Revised Codes, sec. 6481.) The guardian *ad litem* is appointed upon the application of a friend or relative, or by one of the parties to the action. We apprehend that, in all cases where the incompetent is plaintiff, the application should be made by a relative or friend. (Revised Codes, sec. 6482.) From the use of the word "may," in the last sentence of section 6481, *supra,* wherein it is declared that "a guardian *ad litem* may be appointed," etc., it is argued that the power to appoint is discretionary in any case, it being the intent of the statute that the presiding judge should, in all cases in which infants or incompetents are parties plaintiff, determine in the first instance whether they, being in a sense wards of the court, should be permitted to engage in expensive litigation, or whether, when, as in this instance, there is a general guardian, his judgment as to the propriety of bringing the action should be overruled and disregarded. It may be remarked that if the appointment of a guardian *ad litem* on behalf of a plaintiff infant or insane incompetent is lodged in the discretion of the district court exclusively, the same rule would apply to the power of appointment of such a guardian on behalf of an infant or insane defendant, because the language used is general and applies to both plaintiffs and defendants belonging to this class. This is clearly not the meaning of the statute. To what ex-

tent, however, if any, this view should be upheld, we shall not undertake to decide definitely. Under the facts presented, the necessity does not arise. The assertion of the defendant in this regard may be conceded for the purposes of this case.

There was filed on behalf of the incompetent a complaint showing a clear violation of his personal rights. Evidently, the sufficiency of the statements therein to invoke the power of the court to grant the relief demanded was not considered. Indeed, it could not be considered, because their sufficiency was never questioned. It was shown that the action could not proceed without the guardian, because the general guardian, it appeared, had refused to act. In the absence of a showing to the contrary of facts and circumstances appealing to the alleged discretion of the court, there was nothing to put it in motion to deny an application which was *prima facie* sufficient. The action of the court amounted to such an abuse of discretion as that it may be said to have been arbitrary. (*State ex rel. Robinson* v. *Clements*, 37 Mont. 100, 95 Pac. 845.) It is undeniable that it is the intent of the statute that the court should exercise a broad discretion in the selection of the person who shall represent the infant or insane incompetent; but the discretion to be exercised in respect of permitting or refusing to permit the action to proceed, by appointing or refusing to appoint a guardian, if there be any, does not extend to a refusal to make the appointment and to assume jurisdiction of the action when a *prima facie* right to prosecute it is made to appear. It may well be maintained that it is the duty of the court to guard carefully the rights of those who cannot act upon their own judgment because they are *non sui juris*. The discretion in this regard, however, is to be directed rather to the situation developed by the proceeding itself after the court has taken cognizance of the merits, than to a determination *in limine* of the rights involved and without knowledge of the merits. Courts have discretion in this regard. (*Robinson et al.* v. *Talbot et al.*, 25 Ky. Law Rep. 1914, 78 S. W. 1108.)

2. Is *mandamus* the proper remedy? The action of the court was evidently based upon a misconstruction of the statute as

to its duty in the premises. It was tantamount to a refusal to take jurisdiction of the action and proceed, under this mistaken construction of the law. Mr. High, in his work on Extraordinary Legal Remedies, says: "A distinction is recognized between cases where it is sought by *mandamus* to control the decision of an inferior court upon the merits of a cause, and cases where it has refused to go into the merits of the action, upon an erroneous construction of some question of law or of practice preliminary to the final hearing. And while, as we shall see, the decision of such court upon the merits of the controversy will not be controlled by *mandamus*, yet if it has erroneously decided some question of law or of practice presented as a preliminary objection, and upon such erroneous construction has refused to go into the merits of the case, *mandamus* will lie to compel it to proceed." (Section 151.) This language was quoted with approval by this court in *Raleigh* v. *District Court*, 24 Mont. 306, 81 Am. St. Rep. 431, 61 Pac. 991, to support the conclusion of the court that *mandamus* will lie to compel a district court to assume jurisdiction and proceed in its regular exercise whenever, through an erroneous determination of a preliminary question of practice or procedure, upon which the court refused to examine the merits, it has refused to proceed. In that case was involved the question whether, upon the refusal of a district court to entertain a second contest of a will filed in time, but after a former contest had been dismissed on the ground that it did not state sufficient facts, *mandamus* would lie to compel it to assume jurisdiction and proceed. This court held that, since an appeal did not lie, *mandamus* lay to compel the district court to take jurisdiction of the case and proceed. That case cannot in principle be distinguished from this case.

We think *mandamus* is the proper remedy, and therefore direct a peremptory writ to issue commanding the district court to proceed in accordance with the views herein stated.

Writ issued.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

CLARK, APPELLANT, v. OREGON SHORT LINE R. R. CO., RESPONDENT.

38 177
139 194

(No. 2,586.)

(Submitted December 17, 1908. Decided January 25, 1909.)

[99 Pac. 298.]

Statute of Limitations—"Commencement" of Action—Demurrer—Proper Amendment—Relation Back to Original Pleading.

1. An action is "commenced" within the meaning of section 6457, Revised Codes, and the operation of the statute of limitations is thereby arrested, by filing a complaint to which a general demurrer is afterward sustained, provided the pleading is sufficiently substantial to allow of its being properly amended so as to fully state the same cause of action attempted to be stated in the first instance.

Appeal from District Court, Silver Bow County; J. M. Clements, Judge, presiding.

ACTION by William D. Clark against the Oregon Short Line Railroad Company for interfering with a ditch and water right. From a judgment for defendant, plaintiff appeals. Reversed.

Mr. J. F. Nolan, for Appellant.

Citing: *Savage* v. *Phoenix Co.*, 12 Mont. 458, 33 Am. St. Rep. 591, 31 Pac. 66; *Nelson* v. *First Nat. Bank*, 139 Ala. 578, 101 Am. St. Rep. 52, 36 South. 709; *Union Ry. Co.* v. *Wyler*, 158 U. S. 296, 39 Pac. 983, 15 Sup. Ct. 877; *Tucker* v. *Virginia City*, 4 Nev. 20; *Hucklebridge* v. *Atchison T. & S. F. Co.*, 66 Kan. 443, 71 Pac. 814; *Woody* v. *Hinds*, 30 Mont. 189, 76 Pac. 1; *Adams* v. *Patterson*, 35 Cal. 122; *Smith* v. *Day*, 39 Or. 531, 64 Pac. 813, 65 Pac. 1055; *Johnson* v. *Turnell*, 113 Wis. 468, 89 N. W. 515; *Dodge* v. *Hunter*, 85 Me. 121, 26 Atl. 1055.

Mr. J. L. Wines, for Respondent.

The statute does not stop running in a case where the complaint shows that the court was without jurisdiction. (*Sweet*

v. *Chattanooga Electric Light Co.*, 97 Tenn. 252, 36 S. W. 1090; 4 Ency. of Pl. & Pr. 607, 608; *Ball* v. *Hagy* (Tex. Cr. App.), 54 S. W. 915.) "The amendment of the declaration so as to state for the first time a cause of action is equivalent to bringing a new suit as of the date of the amendment, notwithstanding the original declaration was filed within the statute period." (*Eylenfeldt* v. *Illinois Steel Co.*, 165 Ill. 185, 46 N. E. 266; *Blake* v. *Minker*, 136 Ind. 418, 36 N. E. 246; see, also, *Illinois Central R. Co.* v. *Campbell*, 170 Ill. 163, 49 N. E. 314; *Foster* v. *St. Luke's Hospital*, 191 Ill. 94, 60 N. E. 803; *Doyle* v. *City of Sycamore*, 193 Ill. 501, 61 N. E. 1117; *Lilly* v. *Charlotte etc. Co.*, 32 S. C. 142, 10 S. E. 932; *Howard* v. *Windom*, 86 Tex. 560, 26 S. W. 483; 25 Cyc. 1309; *Bricken* v. *Cross*, 163 Mo. 449, 64 S. W. 99.)

MR. JUSTICE SMITH delivered the opinion of the court.

The original complaint in this case was filed in the district court of Silver Bow county on July 30, 1901. A judgment, thereafter rendered in favor of the plaintiff on the pleadings, was reversed by this court. (See 29 Mont. 317, 74 Pac. 734.) General and special demurrers were filed to the original complaint, but the record does not disclose that the court ever passed upon the same, and afterward the defendant filed an answer in which it denied each and every allegation of the complaint. On February 2, 1907, the plaintiff filed his amended complaint, and the court afterward sustained a general demurrer thereto. On March 6, 1907, a second amended complaint was filed, and to that pleading the defendant, among other allegations, answered that the alleged cause of action was barred by virtue of the provisions of certain statutes of limitations. Upon the trial the court below sustained the defendant's contention, refused to allow plaintiff to introduce any evidence under his second amended complaint, and entered judgment for the defendant, from which judgment an appeal is taken.

It is conceded that if the defendant's premises are correct, then its conclusion that the cause of action is barred is also

correct. It contends through its counsel that, as the original complaint did not state facts sufficient to constitute a cause of action, and the second amended complaint was not filed until nearly six years after the cause of action is alleged to have accrued, the statute has run and the cause is barred. The action was brought to recover damages for a wrongful interference with a ditch and water right. Plaintiff originally alleged that the defendant "is" a corporation, and plaintiff "is" the owner of the ditch and water right. He then proceeded to aver that the water right and ditch had been used for the purpose of irrigating "plaintiff's ranch, called the McCauley ranch, for more than 10 years last past," and that "*the defendant*, in the years 1900 and 1901, * * * injured the *plaintiff's* said ditch, * * * all of which has resulted in damage to the plaintiff. * * * " The defendant first filed a so-called plea in abatement, setting forth that its true name is Oregon Short Line Railroad Company, instead of the Oregon Short Line Railway Company, and afterward entered a general appearance and filed an answer, and has been in court ever since. The second amended complaint alleged that at all times mentioned therein the defendant was a corporation, and the plaintiff was the owner of the ditch and water right. Defendant's counsel argues in his brief that the original complaint was fatally defective for want of allegations that the defendant was a corporation, and the plaintiff was the owner of the ditch and water right, at the time the acts of the defendant were alleged to have been committed. Plaintiff's counsel does not controvert this proposition, and perhaps unfortunately so, as all of the members of this court believe that the question is a close one, and the writer of this is of opinion that the complaint was sufficient. (See *Tennison* v. *Tennison*, 114 Ind. 424, 16 N. E. 818; *Kimball & Fink* v. *Borden*, 95 Va. 203, 28 S. E. 207; *Taylor* v. *Perry*, 48 Ala. 240; *Sargent* v. *Steubenville etc. R. R. Co.*, 32 Ohio St. 449; *Gage* v. *Wayland*, 67 Wis. 566, 31 N. W. 108; *Peck* v. *Peck*, 35 Conn. 390; *Pittsburgh, C., C. & St. L. Ry. Co.* v. *Harper*, 11 Ind. App. 481, 37 N. E. 41; *Flenniken* v. *Buchanan*, 21 S. C.

432; *Prindle* v. *Caruthers*, 15 N. Y. 425; *Eans' Admr.* v. *Exchange Bank*, 79 Mo. 182; *Necker* v. *Harvey*, 49 Mich. 517, 14 N. W. 503.) However, appellant says in his brief that the only question to be discussed is, whether a suit is commenced in a court of record by filling a complaint, regardless of whether sufficient facts are stated to constitute a cause of action or not, and we shall confine ourselves to that question, which is a new one in this state.

There are many cases in the books which hold that, where the amendments offered disclose a clear departure from law to law, or from fact to fact, where an entirely new claim or demand is for the first time asserted, or where an additional cause of action is brought forward by way of proposed amendment, the operation of the statute of limitations is not suspended by filing the original complaint. There appears to be little, if any, diversity of opinion among courts and text-writers as to the law in such cases. (25 Cyc. 1308; *Union Pac. Ry. Co.* v. *Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983.) Then there is a class of cases holding that where the original complaint states a cause of action, but does it imperfectly, and afterward an amended complaint is filed correcting the defect, the plea of the statute of limitations will relate to the time of filing the original complaint. (25 Cyc. 1307.) Again, there are cases holding that where the original complaint states no cause of action whatever, it will not arrest the running of the statute, and an amendment made after the bar of the statute is complete will be regarded as the beginning of the action, in reckoning the statutory period of limitation (25 Cyc. 1309), and these are the cases relied upon by the respondent.

As a copy of the original complaint is before us, we have no hesitancy in saying that the filing of the same constituted at least a *bona fide* attempt to commence an action. It would be interesting to inquire, if we might do so, whether it actually fails to state a cause of action, or is simply uncertain in its allegations. Another interesting question which might have been presented is whether there may not be a distinction between a complaint

which merely omits some formal allegation, or is imperfect of statement, and one from which it clearly appears that the plaintiff has no cause of action, or has filed what the court would say is no complaint at all, even though a general demurrer to either would be well taken. The courts of Illinois and Kansas have laid down, and consistently adhered to, the rule that an amendment to a declaration or complaint, so as to state for the first time a cause of action, is equivalent to bringing a new suit as of the date of the amendment, notwithstanding the original declaration or complaint was filed within the statutory period. (*Eylenfeldt* v. *Illinois Steel Co.*, 165 Ill. 185, 46 N. E. 266; *Illinois Central R. Co.* v. *Campbell*, 170 Ill. 163, 49 N. E. 314; *Mackay* v. *Northern Milling Co.*, 210 Ill. 115, 71 N. E. 448; *Missouri, K. & T. Ry. Co.* v. *Bagley*, 65 Kan. 188, 69 Pac. 189, 3 L. R. A., n. s., 259.) On the other hand, we have the dissenting opinion, in the case last cited, of Chief Justice Doster, in which it is said: "I dissent from the judgment in this case, and from so much of the opinion as applies the statute of limitations to the case of defendant in error, and am authorized to say for Justice Ellis that he also dissents. The majority opinion is entirely too technical. The original petition was defective because incomplete in its formal allegations. It simply omitted the statement of the consideration for the promise sued on. The amendment merely supplied the allegation of that element of the contract. Now, in such cases we understand the rule to be that petitions are amendable even after the running of the statute of limitations; that is, the incomplete allegations may be helped out by amendment. However, one may not introduce a new cause of action into a case by way of amendment of his petition after the period of limitation has run against it. He may not, under the guise of amendment, change his cause of action from one sued on during its life to one against which the bar of the statute has run, nor may he by way of amendment tack a barred cause of action onto one against which the statute has not run. The decisions cited in the majority opinion are instances of changes from one cause of action to another,

and do not constitute precedents for the ruling made in this case. We would pursue the subject further, and collate the authorities on this point, but for the fact that the decision made can be shown to be erroneous upon plain statutory grounds."

In the case of *Prokop* v. *Gourlay*, 65 Neb. 504, 91 N. W. 290, the supreme court of Nebraska held that, where the owner of personal property delivered it to another for sale on commission, and no time was fixed within which such sale was to be made, the law would imply a reasonable time, and a petition which failed to allege that a reasonable time had expired for making such sale was fatally defective. The original petition was afterward amended in the court below by adding the allegation that a reasonable time had elapsed, and the plaintiff thereafter appealed from a judgment in favor of the defendant. The supreme court said: "A motion was made by the defendants to strike the amended petition, for the reason that it was not an amendment, but set up a new cause of action, and did not accrue within four years, and that, so far as amended, it was a departure from the original cause of action in the justice court. This motion was overruled. A demurrer was then filed to the petition, and sustained upon the ground that the amended petition set up a new cause of action, and was therefore barred by the statute of limitations, and the cause was thereupon dismissed. * * * Without considering whether the question proposed can be properly raised by demurrer, it will be seen that there is only one question presented, and that is whether or not the amendment to the petition was such as to set up a new cause of action, or whether the additional facts alleged were merely an amplification of the original. From the opinion of Commissioner Albert, it appears that the judgment based upon the first petition was reversed for the reason that, the petition having failed to allege that a reasonable time had elapsed after the delivery of the organ to the bailee, it was insufficient to state a cause of action in conversion. The only additional allegations in the amended petition to those in the bill of particulars upon which the action was begun are that

the defendants had the property for a reasonable time, and did not sell the same, that a reasonable time within which to sell it would be from six to eight months, and that the reasonable value of the property was the sum of $68. It is obvious that the subject matter of the action is the same, that the cause of action is the same, and the relief sought is the same in these several pleadings. The grounds of the action are the delivery of possession of the property to the defendants as bailees, the demand made upon them by the plaintiff for its return, and the refusal and conversion to their own use; the only additional fact alleged being that they had been in possession of the property a reasonable length of time within which to make the sale before the plaintiff made the demand. It is elementary that, where the identity of the cause of action and the relief demanded are the same, a change in the form of the allegations, or an additional allegation amplifying the original petition, does not set up a new cause of action. No new wrong is charged upon the part of the defendants by the amended petition. The action originally was for the wrongful conversion of the organ, though the cause was defectively stated, and the amended petition merely supplies a necessary allegation omitted in the former pleading. This is allowed by section 144 of the Code of Civil Procedure. The statute of limitation ceased to run upon the beginning of the action in the justice's court; and, the cause of action being the same, it is not now barred." (*Gourlay* v. *Prokop,* 71 Neb. 607, 99 N. W. 243, 100 N. W. 949. See, also, *Norman* v. *Central Ky. Asylum,* 26 Ky. Law Rep. 71, 80 S. W. 781; *Alabama etc. R. R. Co.* v. *Thomas,* 89 Ala. 294, 18 Am. St. Rep. 119, 7 South. 762; *Tucker* v. *Mayor etc.,* 4 Nev. 20; *Turner* v. *Mitchell,* 22 Ky. Law Rep. 1784, 61 S. W. 468; *Missouri, K. & T. Ry. Co.* v. *McFadden,* 89 Tex. 138, 33 S. W. 853.) The supreme court of Alabama has gone further, perhaps, than any other court in applying the principle contended for by the appellant. (See *Agee* v. *Williams,* 30 Ala. 636; *Sublett* v. *Hodges,* 88 Ala. 491, 7 South. 296.)

But, after all, the question presented must be determined in the light of our own Code provisions. Title II of the Code of Civil Procedure is headed "Time of Commencing Actions." Chapter I of that Title is headed "The Time of Commencing Actions in General," and section 6428, Revised Codes [section 470, Code Civ. Proc. 1895], reads as follows: "Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute." Chapter II is entitled "The Time for Commencing Actions for the Recovery of Real Property." Chapter III is entitled "The Time of Commencing Actions Other Than for the Recovery of Real Property." Chapter IV is entitled "General Provisions as to the Time of Commencing Actions." And section 6457, Revised Codes, being the first section under this last chapter, reads as follows: "An action is commenced within the meaning of this title, when the complaint is filed." Section 6464, Revised Codes, provides as follows: "If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal, without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits; the plaintiff, or, if he dies, and the cause of action survives, his representative may commence a new action for the same cause, after the expiration of the time so limited, and within one year after such reversal or termination." This court in *Glass* v. *Basin & Bay State Min. Co.*, 35 Mont. 567, 90 Pac. 753, said: "A judgment rendered on a demurrer to the complaint may or may not be a judgment on the merits, depending upon the circumstances of each case. If the judgment determines the merits of the controversy as distinguished from the merits of the pleading attacked, it is a judgment on the merits; * * * otherwise it is not." And in *Kleinschmidt* v. *Binzel*, 14 Mont. 31, 52, 43 Am. St. Rep. 604, 35 Pac. 460, 464, the court said: "The authorities support the proposition urged by respondent that if the alleged

cause of action is submitted on the merits by demurrer, admitting the facts alleged, but placing over against them in the judicial scale the proposition of law that the facts pleaded and thus admitted are insufficient to warrant judgment in favor of the pleader, and upon due weighing of the law and the facts, those facts are adjudged insufficient by sustaining the demurrer, and this ruling is allowed to stand, those facts thereby pass under the rule of *things adjudged;* and the party against whom such adjudication proceeds, as well as his privies and representatives, are thereby barred from again asserting the same facts in another action pertaining to the subject as effectually as though such facts were found from the proof, or admitted *ore tenus* in the course of the trial. Such appears to be the rule deducible from the authorities, without much conflict. * * * But this rule should always be stated and applied with due regard to some modifying conditions, which it is not permitted to violate. Thus, when the pleader has submitted to the ruling of the court on demurrer, against the sufficiency of the cause of action or defense, as stated, that ruling would not bar him, or those in privity with him, from again asserting the same facts, accompanied by additional allegations which complete the statement of a good cause of action or defense."

If it be true that when the statutory period has expired pending the decision of the court on demurrer to the complaint, which decision does not determine the cause on the merits, the party may commence a new action for the same cause within a year, asserting again the same facts, accompanied by additional allegations which complete the statement of a good cause of action, then it would seem reasonable to conclude that the filing of the original complaint, which was defective for want of such "additional allegations," did in fact have the effect of arresting the operation of the statute, and was the commencement of an action, and it cannot be said in this state that the action is always barred unless a good complaint is filed in the first instance. Indeed the language employed in section 6464, *supra,* may perhaps be construed as a legislative recognition of the principle

that an action is commenced by filing what purports to be a complaint, whether it states facts sufficient to constitute a cause of action or not. But it is suggested that such a rule would allow the filing of any sort of document designated a complaint to arrest the running of the statute, even a blank, or other paper, which was in no sense a complaint; that it would be impossible to determine what was a complaint, and what not, and therefore impossible to decide whether or not the action was commenced. But there is a weakness in this suggestion. Surely, courts are competent to say whether an alleged pleading is or is not a complaint. Analogous questions are being constantly decided. But there are other statutory provisions shedding light upon the question. Section 8079, Revised Codes, defines an action as an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Section 7188, Revised Codes, reads as follows: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." It would seem natural to inquire, in this connection, whether this action was pending from July 30, 1901, to March 6, 1907, during which time the defendant appeared generally and answered the original complaint, filed two demurrers, and brought a judgment for the plaintiff to this court for review on appeal.

But we are able to place our decision upon broader and more substantial grounds than any of those above suggested, although the statutes just noticed must not be lost sight of in construing the ones we are about to cite. Section 6532, Revised Codes, provides that the complaint in an action must contain a statement of the facts constituting the cause of action in ordinary and concise language. The defendant may demur to the complaint for want of a sufficient statement of facts, and this objection is never waived. (Revised Codes, sec. 6539.) The plaintiff may amend once as of course before answer or demurrer filed

(Revised Codes, sec. 6588). The court may, in furtherance of justice, allow a party to amend any pleading by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, and may likewise, in its discretion, after notice, allow an amendment to any pleading in other particulars (Revised Codes, sec. 6589). Upon the decision of a demurrer, the court may, in its discretion, allow the party in fault to plead anew or amend (Revised Codes, sec. 6591). This last statute is taken advantage of daily in the courts, and is, of course, a legislative declaration that a pleading which is in fact a complaint may be amended, even though it fails to state facts sufficient to constitute a cause of action; that such a pleading is not a mere nullity, but is something which may be amended. What, then, is the effect of the amendment? As a general rule, an amendment properly allowed relates back to the date of the original pleading or process. (*Rutherford* v. *Hobbs*, 63 Ga. 243; *Woody* v. *Hinds*, 30 Mont. 189, 76 Pac. 1; *Martin* v. *Coppock*, 4 Neb. 173.) In the Georgia case last cited the court said: "What is there, in a misdescription of the plaintiff, or in a deficient description of him or of his title, which renders it necessary, or even proper, that amending it should destroy the identity of the action when various other amendments, equally material to a recovery, might be made without working any such result? Once settle that a given amendment to a declaration can properly be made—that is, that it is both authorized and appropriate—and it follows logically that the making of it tends to preserve and forward the action, and not to overthrow or extinguish it. To that end was the privilege of amending established. Amendment is completion of the incomplete or correction of the incorrect, and as well might it be said that judicious additions to or alterations of an edifice will cause it to fall, as that judicious amendment to a declaration will destroy the case. And if the suit is in legal identity the same suit after the amendment as it was before, there would be, and could be, no running of the statute of prescription whilst it was pending, the principle of unity compre-

hending both the sole plaintiff and his single and only cause of action." (See, also, *Sanger* v. *City of Newton*, 134 Mass. 308.) And so in the case at bar. The plaintiff made a *bona fide* attempt to commence an action by filing a complaint containing insufficient allegations as to the legal capacity of the defendant and the plaintiff's ownership of the property alleged to have been injured. A general demurrer to the complaint was sustained, and the court properly allowed the plaintiff to amend. The amendments supplemented the allegations of the original complaint, perfected the only cause of action claimed by the plaintiff, and therefore related back to the date of filing the original complaint.

We are of opinion that the court below was in error in holding that the action was not commenced by filing the original complaint, and that the operation of the statute of limitations was not arrested by filing that pleading. The judgment appealed from is reversed, and the cause is remanded for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

DODD, RESPONDENT, *v.* VUCOVICH ET AL., DEFENDANTS; CASEY, APPELLANT.

(No. 2,588.)

(Submitted December 18, 1908. Decided January 25, 1909.)

[99 Pac. 296.]

Landlord and Tenant—Leases—Bond for Rent—Liability of Sureties—Modification of Conditions of Lease—When Immaterial.

Landlord and Tenant—Lease—Bond for Rent—Consideration.

1. A bond, given to secure the payment of rent, which was signed after the lease of the property had been executed, was not *nudum pactum*,

where both instruments were executed on the same day and where the bond referred to and made the latter instrument a part of it. They must be construed as having been executed contemporaneously and as amounting to one instrument.

Same.

2. The bond above referred to could not be said to have been without sufficient consideration for the further reason that, so far as the sureties were concerned, the understanding was that the lease would not become effective until the bond had been given; i. e., the consideration for the execution of the bond was the favor which they received by having the lessee take possession of the leased premises.

Same—Modification of Conditions of Lease—Liability of Sureties.

3. A lease of real property provided that rent should be paid quarterly in advance. A bond was given to secure the rent. The lessor voluntarily and without consideration therefor, reduced the rent for one quarter and at different times permitted the lessee to make payments at irregular intervals, and not as provided in the lease. *Held*, under subdivisions 2 and 3 of section 5686, Revised Codes, that in the absence of any showing that the sureties on the bond were injured or prejudiced by the action of the lessor, they were not released from liability; *held*, further, that they were not released under subdivision 1 of said section, in view of section 5674, which provides that a promise by a creditor which for any cause is void or voidable at his option, does not alter the obligation of the principal within the meaning of section 5673, since the concessions made by the lessor were promises without consideration and therefore void as to him.

Principal and Surety—Obligation of Sureties—How Construed.

4. While it is true that, in the absence of statute, the obligation of a surety is *strictissimi juris*, in this state the statutes covering the subject must control.

Landlord and Tenant—Lease—Bond—Occupancy by Others than Lessee—Release of Sureties.

5. Where a lessee of premises failed in business during the life of the lease, and the lessor, without modifying or changing the lease in any respect, permitted others to take possession in order to minimize the damages recoverable under a bond given to secure payment of the rent, the sureties were not released by the action of the lessor in this respect.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by W. E. Dodd against M. G. Vucovich and another. From an order granting plaintiff a new trial after nonsuit as to defendant George H. Casey, Casey appeals. Affirmed.

Messrs. McBride & McBride, for Appellant.

Messrs. Maury & Templeman, and *Mr. B. K. Wheeler*, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On January 4, 1902, the plaintiff by an instrument in writing leased certain premises in Butte to defendant Vucovich for a term of three years from February 20, 1902, at the agreed rental of $300 per month, payable quarterly in advance. On the same day a bond to secure the payment of the rent was executed and delivered to the plaintiff, signed by Vucovich as principal, and James W. Forbis and the defendant, George H. Casey, as sureties. This bond recites that "on the 4th day of January, 1902, W. E. Dodd leased and let unto M. G. Vucovich those certain premises" (describing them), etc. The complaint alleges that the plaintiff fully performed all the terms of the agreement by him to be performed, but that Vucovich did not pay $845 of the rent so agreed to be paid. The prayer is for that amount, with interest from November 20, 1904.

The defendant Casey made separate answer, in which, after putting in issue most of the allegations of the complaint, he alleges affirmatively: "That the signing of the alleged bond, plaintiff's Exhibit B, by this defendant was and is without consideration, in this: That the said lease, plaintiff's Exhibit A, prior to the time that said bond was presented to this defendant for signature, and prior to the time he signed the same, had been by the plaintiff signed and executed and delivered to the defendant, M. G. Vucovich." It is further alleged in this answer that the plaintiff, by agreement with Vucovich, but without the knowledge or consent of the surety, Casey, modified the terms of the lease by extending credit to Vucovich on certain payments of rent, changing the rate of the rental and the times for the payments of rent, and by reason thereof the bond was abrogated and annulled as to the surety Casey. These affirmative allegations were put in issue by the reply.

Upon the trial the plaintiff offered evidence tending to show that Vucovich went into possession under the lease on February 20, 1902, and paid the rent according to the terms of the lease up to May 20, 1903, on which date the sum of $300 was

paid, and the further sum of $600 was paid on June 20, 1903. For the quarter beginning August 20, 1903, the plaintiff voluntarily reduced the rent to $750, payable monthly, and for the quarter beginning November 20, 1903, the rent was paid as follows: November 30, $300; January 2, 1904, $600. On February 16, 1904, Vucovich paid $300, which paid the rent up to March 20, 1904, but did not pay any rent thereafter. It appears from the record that the sheriff got possession of the place about April 7, 1904, and paid $300 rent for one month, and thereafter up to February 20, 1905, Barnet Bros. were in possession of the premises, and paid rent at the rate of $225 per month.

The cause was tried to the court sitting with a jury. At the conclusion of plaintiff's case defendant Casey moved for a nonsuit as to him, which motion was sustained. Thereafter the plaintiff moved for a new trial, and this motion was sustained. From the order granting the plaintiff a new trial the defendant Casey appeals.

Two contentions are made by counsel for appellant, as follows:

(1) It is said that the bond was void because there was not any consideration for its execution. It is said that it appears from the face of the bond that the lease had actually been executed at the time the bond was signed, and upon the familiar rule of law that a past consideration will not support an undertaking, it is urged that the bond is in fact *nudum pactum*. With this we do not agree. The bond refers to and makes the lease a part of it. Both instruments were executed on the same day, and, since the law does not take cognizance of a fraction of a day, the two instruments will be construed as having been executed contemporaneously and as amounting to one transaction. (9 Cyc. 580-582; Revised Codes, sec. 5031.) But for the stronger reason we think there was a sufficient consideration for the execution of the bond. Assuming that the lease was signed before the bond was executed, the bond does contain this provision: "Whereas, the said Dodd requires as a condition to the giving

of the said lease, security for the payment of the rents reserved—Now, therefore," etc. From this it clearly appears that the parties all understood that the lease did not become effective as such until the bond was given; or, in other words, it was understood that the consideration for the execution of the bond, so far as the sureties were concerned, was the favor which the sureties received by having the lease become effective in order that Vucovich might enjoy the possession of the leased premises. If such was the understanding of the parties, then the mere fact that the bond was not signed until after the lease was executed is immaterial. (*McDonald* v. *Randall,* 139 Cal. 246, 72 Pac. 997; *Stroud* v. *Thomas,* 139 Cal. 274, 96 Am. St. Rep. 111, 72 Pac. 1008; *McNaught* v. *Claughry,* 42 N. Y. 22, 1 Am. Rep. 487.)

(2) It is contended that the surety was released from liability by reason of the changes made in the terms of the lease: (a) As to the amount of rent to be paid for the quarter beginning August 20, 1903; and (b) as to the time for making the several payments of rent after May 20, 1903. It appears that during the fall of 1903, while business in Butte was dull, the landlord, at the request of the tenant, and without any consideration therefor, voluntarily reduced the rent for the quarter beginning August 20, 1903, from $900 to $750, and at different times permitted the tenant to make payments at irregular intervals, and not quarterly, in advance, as provided in the lease. It is said that the obligation of the surety "is *strictissimi juris,* and he is discharged by any alteration of the contract to which his guaranty applied, whether material or not, and the courts will not inquire whether it is or is not to his injury." In the absence of statute this is undoubtedly true; but "the Code establishes the law of this state respecting the subjects to which it relates." (Revised Codes, sec. 8061.) Section 5686, Revised Codes, provides: "A surety is exonerated: (1) In like manner with a guarantor. (2) To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights,

or which lessens his security; or (3) to the extent to which he is prejudiced by an omission of the creditor to do anything, when required by the surety, which it is his duty to do." In the absence of any showing that the surety was, or indeed could have been, injured or prejudiced by these changes, he was not released from liability, under subdivisions 2 or 3 of the section above. Was he released under subdivision 1? Section 5673, Revised Codes, provides: "A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is *altered in any respect*, or the remedies or rights of the creditor against the principal, in respect thereto, in any wise impaired or suspended." Standing alone, this section would warrant the release of the surety in this instance; but the next section provides: "Sec. 5674. A promise by a creditor, which for any cause is void, or voidable by him at his option, does not alter the obligation, or suspend or impair the remedy, within the meaning of the last section." If Dodd had received any consideration for reducing the rent from August 20 to November 20, 1903, or for permitting Vucovich to pay the rent in monthly installments, then clearly Casey would have been released, under the provisions of section 5673 above; but, since the record discloses that the concessions made by Dodd were promises without considerations, and therefore void as to him, they did not operate to release the surety. (Revised Codes, sec. 5674.)

There is also some suggestion that the surety was released by reason of the fact that Dodd permitted other tenants to occupy the premises during the term mentioned in the lease. It would seem from the record that some time prior to April 7, 1904, Vucovich failed in business; that the sheriff was in possession for one month; and that Barnet Bros. were in possession the remainder of the term. But these people were not tenants under the lease at all. The lease was not modified or changed in any respect to permit them to occupy the premises; but, Vucovich having failed, the plaintiff appears to have let these par-

ties into possession in order to minimize the damages recoverable on the bond.

We think the district court erred in granting the nonsuit, and made a proper correction of the error in granting plaintiff a new trial. The order is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

PULLEN, RESPONDENT, *v.* CITY OF BUTTE, APPELLANT.

(No. 2,592.)

(Submitted December 19, 1908. Decided January 25, 1909.)

[99 Pac. 290.]

Personal Injuries—Cities and Towns—Defective Sidewalks—Complaint—Insufficiency.

1. A complaint in an action against a city for damages alleged to have been sustained by reason of a defective sidewalk, which merely stated that the city had negligently placed the sidewalk in an unsafe, dangerous and defective condition and permitted it to remain so, but failed to specify in what respect the walk was unsafe, dangerous or defective, did not state facts sufficient to show negligence on the part of the city. The allegation amounted to a bare legal conclusion of the pleader.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by Henrietta Pullen against the city of Butte. From a judgment for plaintiff, and from an order refusing a new trial, defendant city appeals. Reversed and remanded.

Mr. Edwin S. Booth, and *Mr. W. E. Carroll,* for Appellant.

Mr. Lewis A. Smith, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action for damages for personal injuries alleged to have been sustained by the plaintiff. The only allegation

in the complaint which seeks to charge the defendant city with negligence is the following: "That the said defendant * * * willfully, negligently, carelessly, and wrongfully caused the public sidewalk on the west side of Idaho street, between Galena and Mercury streets, * * * to be placed in, and willfully, carelessly, wrongfully, knowingly and negligently permitted the same to remain in, an unsafe, dangerous, and defective condition." At the close of plaintiff's case, the defendant moved for a nonsuit, specifying, among other grounds, that the complaint does not state facts sufficient to constitute a cause of action. The motion was denied. The plaintiff had judgment, and, from the judgment and an order denying it a new trial, the defendant appeals.

It will be necessary to notice but one contention made by the appellant. It is said that the complaint does not allege any facts showing, or tending to show, negligence on the part of the city. The allegation of the complaint is quoted above. It will be observed that it is not anywhere stated in what respect the sidewalk was unsafe, dangerous, or defective. Respondent, however, answers that "negligence is an ultimate fact, and not a conclusion of law, and a general allegation of negligence is sufficient"; and, again, "a general allegation of negligence in the particular act complained of, resulting in damages, is good, at least in the absence of a special demurrer." With these declarations we do not find any fault whatever. They simply do not reach the question we are considering. What do they mean? In *Smith* v. *Buttner*, 90 Cal. 95, 27 Pac. 29, the court, in considering the question now before us, said: "It is well settled that negligence may be charged in general terms; that is, what was done being stated, it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent." In other words, if the doing of certain acts, under certain circumstances, constitutes negligence, it is sufficient after specifying the acts to say that they were negligently done; or, if the failure to do certain acts constitutes negligence, then it is sufficient, after specifying the acts, to say

that the defendant negligently failed to do them. With few exceptions, this is the full extent to which the authorities go, and, indeed, most of the authorities cited by counsel for respondent recognize the rule we have stated. For instance, *King* v. *Oregon Short Line R. Co.*, 6 Idaho, 306, 55 Pac. 665, 59 L. R. A. 209, is cited, and our attention is directed to the note in the L. R. A. report. The note reviews the authorities at great length, and in conclusion the author of the note says: "While the above note is a long one, a statement of the general rule that it is sufficient in an action for negligence to state the act by which the injury was caused, and that it was negligently done, is nearly a complete summary." The rule is stated in 1 Abbott's Trial Brief, section 395, as follows: "No particular form of words is necessary to make out an allegation of negligence. It is enough, on demurrer, that facts are stated which show negligence." In 6 Thompson on Negligence, section 7447, the author says: "The general rule is easily stated: Ultimate facts only are to be pleaded, and it is not good pleading to plead matters of evidence. But the application of the rule involves difficulty. * * * If the pleading fairly informs the opposite party of what he is called upon to meet, and the specific acts of negligence are followed by a general statement that the acts were negligently done, * * * there ought not to be much trouble about the question. Very plainly the pleader should set out the acts or omissions of the defendant upon which he bases his right to recover, and should show that they occurred through or by the negligence of the defendant." To the same effect are *McGonigle* v. *Kane*, 20 Colo. 292, 38 Pac. 367; *City of New Albany* v. *McCulloch*, 127 Ind. 500, 26 N. E. 1074; *Snyder* v. *Wheeling Electrical Co.*, 43 W. Va. 661, 64 Am. St. Rep. 922, 28 S. E. 733, 39 L. R. A. 499; *McPherson* v. *Pacific Bridge Co.*, 20 Or. 486, 26 Pac. 560.

Section 6532, Revised Codes, provides, among other things: "The complaint must contain * * * (2) a statement of the facts constituting the cause of action, in ordinary and concise language." In *Woodward* v. *Oregon Ry. & Nav. Co.*, 18 Or.

289, 22 Pac. 1076, the court says: "Our Code, section 66, requires the complaint to contain a plain and concise statement of the facts constituting the plaintiff's cause of action; and one of the great objects to be attained by this enactment was to compel the plaintiff to place upon the record the specific and particular facts which he claims entitle him to recover. The field of inquiry is thus narrowed, and the defendant is enabled to come into court advised beforehand of the particular facts he must come prepared to contest. * * * It is true, in some jurisdictions, it seems to be held sufficient to allege generally that the injury complained of was carelessly and negligently inflicted upon the plaintiff, or that, by reason of the carelessness and negligence of the defendant, the plaintiff was injured; but this mode of statement has never been sanctioned or approved in this state, is at variance with the plain requirements of the Code, and would give the defendant no notice of the acts claimed to be negligent, so that he might come prepared to meet them."

Counsel for respondent also cites *Storm* v. *City of Butte*, 35 Mont. 385, 89 Pac. 726. But in that case the complaint set forth the facts constituting the negligence, and in considering it this court said: "It is directly alleged that the city negligently permitted snow and ice to accumulate on the sidewalk at the point where the injury occurred, to the depth of several inches, and that this snow and ice, by reason of persons passing over it, and other causes, became so uneven and rounded, and had such an angle from the level of the sidewalk, that a person could not walk over it without danger of falling, and that this condition was known to the city for a long time prior to the date of plaintiff's injury. It is in effect alleged, though not very specifically, that this accumulation of snow and ice under the circumstances described constituted an obstruction which the city negligently permitted to remain there without proper protection, and without any light or signal to indicate danger. We are of the opinion that these allegations are sufficient."

In our opinion the allegation that the city negligently placed the sidewalk in an unsafe, dangerous and defective condition and permitted it to remain in such condition is but the statement of the bare legal conclusion of the pleader, and did not state facts sufficient to show negligence on the part of the city. The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

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38 198 f38 235 METTLER, APPELLANT, *v.* ADAMSON ET AL., RESPONDENTS.

(No. 2,587.)

(Submitted December 18, 1908. Decided January 30, 1909.)

[99 Pac. 441.]

Justices' Courts—Pleadings—Appeal—Record—Jurisdiction—Interpleader—Equitable Defenses.

Justices' Courts—Pleadings—Reply.

1. A reply is not one of the pleadings which may be filed in a justice's court.

Appeal—Record—Papers—Identification.

2. Copies of papers incorporated in the record on appeal to the supreme court, in an action brought to the district court from a justice's court, which are not identified by a bill of exceptions, nor even referred to by the clerk's certificate as correct copies, will, on motion, be stricken out.

Same—Dismissal of Action—Final Decision—Exceptions.

3. An order of the district court sustaining a motion to dismiss an action appealed to it from a justice's court is a "final decision"; and as such it is deemed to have been excepted to. (Revised Codes, sec. 6784.)

Same—Record—Incorporation of Papers not Identified—Effect.

4. The fact that papers which could only be made a part of the record on appeal by bill of exceptions were merely copied into it without anything to identify them, did not destroy the character or identity of the record.

Same—From Justices' Courts to District Courts—Record on Appeal to Supreme Court—How Made up.

5. The record on appeal to the supreme court in an action brought to the district court from a justice's court must be made up as in cases originating in the district court, and it is not necessary that the whole record be embodied in a bill of exceptions.

Justices' Courts—Appeal—Jurisdiction of Appellate Court.

6. In an action appealed to the district court from a justice's court, the former has the same extent of jurisdiction as the latter had.

Same—Interpleader—Effect on Jurisdiction.

7. Where a justice of the peace had jurisdiction of the subject matter and the parties, in an action which at its commencement was a strictly legal one (to recover $66.97 on account of labor performed), a proper substitution of parties defendant did not have the effect of converting the cause from a legal into an equitable action and depriving the justice of jurisdiction to proceed.

Same—Jurisdiction—Equitable Defenses.

8. Defendants, properly substituted in an action before a justice of the peace brought by the assignee of a claim for labor, could not deprive him of jurisdiction by the interposition of a defense of which he had not jurisdiction, viz.: fraud in the assignment.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by F. W. Mettler against J. M. Adamson and another. From a judgment of the district court, on appeal from a justice's court, dismissing the action, plaintiff appeals. Reversed and remanded.

Mr. W. D. Tipton, for Appellant.

Mr. E. A. Carleton, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Plaintiff brought this action in one of the justices' courts of Helena township, to recover from the American Smelting and Refining Company, a corporation, the sum of $66.97, due on account for labor and services performed for the defendant by one J. Panjan during the month of March, 1907, it being alleged that the account had been assigned to one Lozar for value on March 13, and thereafter, on April 25, assigned by him to the plaintiff. It was brought into the district court by appeal. When it came on for trial in that court, the defendant moved for a dismissal of the action. This motion was sustained, and judgment entered for the defendants. Plaintiff appealed.

Soon after the record was filed in this court the defendants moved to have stricken therefrom all papers other than the copies of the complaint, answer, judgment and notice of appeal, on the ground that they are not authenticated by a bill of exceptions, and are therefore not properly a part of it. At the

same time a motion was filed asking for a dismissal of the appeal on the ground that the record does not contain a copy of the judgment-roll. Decision of these motions was deferred until a hearing on the merits, and were then submitted. The papers referred to are a copy of an affidavit by the defendant corporation, containing the necessary allegations to authorize the justice to order the persons who now appear as defendants to be substituted as such in its stead; a copy of the notice of the application for an order of substitution; a copy of the order; a copy of the justice's docket; a copy of the notice of appeal to the district court; a copy of plaintiff's reply; a copy of the motion made by the defendants to dismiss the action; and a copy of the order in the minutes of the court sustaining the motion. None of these are identified by a bill of exceptions, or otherwise, to bring them into the record. They are not even referred to by the clerk in his certificate as correct copies, he having certified the judgment-roll only. A reply is not one of the pleadings which may be filed in a justice's court. (Revised Codes, sec. 7006.) The motion to strike must therefore be sustained as to all of these papers, except the copy of the order sustaining the motion to dismiss the action. This was the final decision of the court disposing of the action. As such it is deemed to have been excepted to, and to preserve the exception, no formal bill was required. (Revised Codes, sec. 6784.) It is also properly a part of the judgment-roll. (Revised Codes, sec. 6806.) Do this and the other papers constitute the judgment-roll or record to be used on appeal?

Counsel for respondents insist that, even if all the papers that would otherwise constitute the roll are in the record, its character and identity are destroyed by the fact that the excluded papers are copied into it. There is no merit in this contention. All of them, except the order, might have been made a part of the record by bill of exceptions. Their presence in it does not affect the character of it because they are not embodied in a formal bill and certified by the trial judge.

Counsel insists, also, that since the cause originated in a justice's court, and the appeal to this court is from an intermedi-

ate court, and since the record must on its face show that the intermediate court properly obtained jurisdiction by appeal from the justice's court, the whole record should have been embodied in a bill of exceptions. This is the proper method of making up the record in some jurisdictions, based, it seems, upon provisions of statutes applicable. (*Tarwater* v. *Long*, 36 Mo. App. 182.) Under our statute, however, the record on appeal in such cases must be made up as in cases originating in the district court. The statute (Revised Codes, sec. 6806) declaring what it shall be makes no distinction between records in cases originating in the district court and those in cases brought into that court by appeal. There is no other provision specially applicable to the latter, so that this general provision must apply, or there can be no record on appeal to this court in such cases. In the title of the Revised Code of Civil Procedure, regulating appeals to this court, it is declared: "A judgment or order in a civil action, except when expressly made final by this Code, may be reviewed as prescribed in this title, and not otherwise." (Revised Codes, sec. 7096.) The general policy of our code provisions is that, after cases have reached the district court on appeal from a justice's court, the proceedings thenceforth shall be the same as in cases originating in the district court. The papers necessary to be presented to this court on appeal from the judgment are enumerated in section 7112, and among them is the judgment-roll. There is therefore before this court in this case sufficient to justify a review of the judgment and a determination of such questions as properly arise thereon touching the regularity of the proceedings in the district court in reaching it. The motion to dismiss the appeal is therefore denied.

When we come to examine the judgment upon the merits, however, we find a condition presenting some difficulty. It appears from the answer that the persons who now appear as defendants were not originally defendants, but were by order of the justice substituted as such. From this fact we may infer that the justice made the substitution in pursuance of the provisions of the statute (Revised Codes, sec. 6495); for it appears from

their allegations that they assert a right to the amount due on the account by virtue of a judgment against Panjan in favor of the defendant Smith by garnishment, under execution served upon the corporation subsequent to the date of the assignment by Panjan to Lozar, but prior to the assignment by the latter to the plaintff, the first assignment being alleged to have been fraudulent and colorable only, and made in order to defeat Panjan's creditors in the satisfaction of their claims against him. Defendant Adamson was made defendant for the reason that he is a constable for Helena township and levied the execution. No question was ever made in the district court that the cause had not been properly brought into that court by appeal. It cannot be gathered from the order exactly what the ground of the court's action was. It states that counsel for defendants objected to the introduction of any evidence, and moved to dismiss the action, and that the motion was, after argument, sustained. The judgment, however, contains sufficient recitals to make the ground of the action clear. It recites: "Counsel for defendants objected to the introduction of any evidence in this case, and moved the court to dismiss the same, for the reason that this court is without jurisdiction to try the same. After argument by counsel the court sustained said motion, and ordered said cause dismissed, and ordered judgment accordingly." Evidently the court and counsel had in mind the distinction between a motion to dismiss an appeal and one to dismiss an action, both being of the opinion that the court properly entertained the appeal in order to relieve the defendants of the necessity of making defense to an action over which the justice's court had no jurisdiction. In any event, this was the result, for, in basing his motion upon the ground stated, counsel assumed that the cause was properly in the district court on appeal, for such disposition of it as that court should deem proper, and thus challenged the jurisdiction of the justice's court over the subject matter.

Was the court in error in assuming that the justice's court was without jurisdiction? Manifestly so. It certainly had ju-

risdiction to entertain an action on the account (Revised Codes, sec. 6286). It had jurisdiction of the defendants, because they were present and defending without objection. But it was argued in this court that the substitution of them in place of the corporation converted the cause into one in equity, and that since a justice's court has no equity jurisdiction, the district court was not clothed with any by the appeal. In a proper case this line of argument is correct. A justice's court has no equity jurisdiction (Constitution, Article VIII, sec. 21), and the district court on appeal has the same extent of jurisdiction as the justice's court has. (*Shea* v. *Regan*, 29 Mont. 308, 74 Pac. 737; *Oppenheimer* v. *Regan*, 32 Mont. 110, 79 Pac. 695.) The substitution of the parties here, however, had no such result as is claimed by counsel. At its commencement the action was strictly a legal action. It is not questioned that the defendants were properly substituted in the case. Having properly come into the case, they could not deprive the justice's court of jurisdiction over it by interposing a defense which it could not entertain. If so, this course might be pursued, in any case, with disaster to a plaintiff who has a good cause of action upon which the justice's court could otherwise grant him relief. There are exceptions to this rule, but this case is not within any of them. (Revised Codes, sec. 6992.) The defense interposed is not equitable in character, within the constitutional prohibition. This prohibition extends to those matters only of which a court of equity has exclusive cognizance. Under the statute, in actions such as this one, interpleader by substitution of parties is permitted in courts proceeding according to the course of the common law, and this permission extends to justice's courts, as was pointed out by this court in *Anderson* v. *Red Metal Min. Co.*, 36 Mont. 312, 93 Pac. 44, where the identical question presented in this case was considered and decided. In that case the claim of the substituted defendant was based upon garnishment proceedings under execution, just as here, and the plaintiff sought recovery as assignee of the creditor of the original defendant. This court said: "The claims of the

parties here present strictly legal issues. The plaintiff claims by assignment. The defendants Paris Bros. claim by virtue of their levy under their execution. The court was not called on to aid these defendants in any way to enforce the lien of their execution, but was required simply to determine whether they had a lien which was paramount to the title of the plaintiff under his assignment. If the plaintiff had not shown title under his assignment, these defendants would have been entitled to judgment for their costs, and they would have been entitled to nothing more if the suit had been brought in the district court, which has equitable jurisdiction in the first instance."

The district court was therefore in error in dismissing the action. The judgment is reversed, and the cause is remanded, with directions to proceed with the trial on the merits, and make such disposition thereof as the rights of the parties require.

Reversed and remanded.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

Rehearing denied March 1, 1909.

DUNLAVEY, APPELLANT, *v.* DOGGETT ET AL., RESPONDENTS.

(No. 2,597.)

(Submitted December 21, 1908. Decided January 30, 1909.)

[99 Pac. 436.]

Water Rights—Contempt—Attorneys' Fees—Costs of Litigation—Not Recoverable.

Contempt Proceedings—Purpose of.

1. The object of contempt proceedings is vindication of the authority of the court, and not indemnity for the plaintiff or any judgment in his favor.

Same—Attorneys' Fees—Costs of Litigation—Not Recoverable.

2. *Held*, that, in the absence of statute on the subject, attorney's fees and other expenses incurred by the owner of a water right in instituting and prosecuting to a successful determination a contempt proceeding for the violation of a decree of court settling his rights, are not recoverable as items in an action against the contemnor for damages proximately caused by his disobedience of the order.

Appeal from District Court, Broadwater County; W. R. C. Stewart, Judge.

ACTION by John Dunlavey against Jefferson Doggett and another for damages on account of interference with water rights. From a judgment on a verdict for defendants and from an order denying a new trial, plaintiff appeals. Affirmed.

Mr. Wm. Wallace, Jr., Mr. J. G. Brown, Mr. R. F. Gaines, and *Mr. J. E. Kanouse,* for Appellant.

In the following cases attorney's fees have been declared proximate damages: *Tully* v. *Ganahl,* 90 Pac. 1049; *Bonesteel* v. *Bonesteel,* 30 Wis. 515; *Bank of Palo Alto* v. *Pacific Co. Cable Co.,* 103 Fed. 841; *Hancock* v. *Hubbell,* 71 Cal. 537, 12 Pac. 619; *Hubbard* v. *Gould,* 74 N. H. 25, 64 Atl. 668; *Roberts* v. *Heim,* 27 Ala. 678; *Cooper* v. *Cappee,* 29 La. Ann. 213; *Flack* v. *Neill,* 22 Tex. 253; *Noyes* v. *Ward,* 19 Conn. 250; *Cleveland etc. Ry. Co.* v. *Bartram,* 11 Ohio St. 457.

Messrs. Walsh & Nolan, and *Mr. E. H. Goodman,* for Respondents.

Citing on their contention that attorney's fees are not recoverable: *McDonald* v. *McConkey,* 57 Cal. 326; *Miller* v. *Kehoe,* 107 Cal. 340, 40 Pac. 485; *Spooner* v. *Cady* (Cal.), 44 Pac. 1019; *Murphy* v. *Mulgrew,* 102 Cal. 547, 41 Am. St. Rep. 200, 36 Pac. 857; *Oelrichs* v. *Williams,* 15 Wall. 211, 21 L. Ed. 43; *Dorris* v. *Miller,* 105 Iowa, 564, 75 N. W. 482; *Gates* v. *City of Toledo,* 57 Ohio St. 105, 48 N. E. 502; *Joslin* v. *Teats,* 5 Colo. App. 531, 39 Pac. 350; *Kelly* v. *Rogers,* 21 Minn. 152; *Jackson* v. *Poteet* (Tex. Civ. App.), 89 S. W. 980; *Clark* v. *Wolfe,* 115 Ga. 320, 41 S. E. 581; *Knefel* v. *Ahern,* 57 Ill. App. 568; *Henry* v. *Davis,* 123 Mass. 345; *Eatman* v. *New Orleans Pac. Ry.,* 35 La. Ann. 1018; *Haverstick* v. *Erie Gas Co.,* 29 Pa. 254; *Welch* v. *Northeastern Ry. Co.,* 12 Rich. (S. C.) 290; *Hoadley* v. *Watson,* 45 Vt. 289, 12 Am. Rep. 197; *Burruss* v. *Hines,* 94 Va. 413, 26 S. E. 875; *Fairbanks* v. *Witter,* 18 Wis. 287, 86 Am. Dec. 768;

Winkler v. *Roeder*, 23 Neb. 706, 8 Am. St. Rep. 155, 37 N. W. 607; 3 Am. & Eng. Ency. of Law, 446; 5 Ency. of Pl. & Pr. 228; 8 Am. & Eng. Ency. of Law, 673; 13 Cyc. 80.

MR. JUSTICE SMITH delivered the opinion of the court.

The amended complaint in this action alleges that the plaintiff is the owner of a certain water right in Confederate creek, Broadwater county, which has heretofore been decreed to him by the district court of Meagher county; that in the year 1905 the defendants wrongfully diverted the water from plaintiff's ditch, and deprived him of the use thereof, to his damage, in loss of crops, in the sum of $400. Plaintiff further alleges as follows: "Plaintiff further avers that he was further damaged by the said acts of defendants in depriving him of water to which he was lawfully entitled, in that in his efforts to obtain the water so withheld he on or about the 30th day of August, 1905, in the district court of Broadwater county, instituted contempt proceedings against the defendants herein, in a case entitled *State of Montana ex rel. John Dunlavey* v. *Jefferson Doggett and Gus E. Pool,* in which said contempt proceedings defendants herein were adjudged guilty of violating the restraining order of the court, which said restraining order was included in the said decree awarding the said water to plaintiff. The said order of the district court of Broadwater county adjudging defendants guilty of contempt of court was thereafter appealed by said defendants to the supreme court of the state of Montana and was by said court affirmed. Plaintiff in the prosecution of said contempt proceedings and in his efforts thereby to secure the water to which he was rightfully entitled necessarily incurred in attorney's fees, witness fees, court costs, and other expenses necessarily incident to a lawsuit an expense of four hundred and fifty dollars ($450)."

The court below in effect sustained a general demurrer to this so-called second cause of action by striking the same after demurrer sustained to substantially the same allegations in the original complaint, and refused to allow plaintiff to introduce

any testimony in support of it, although he offered to prove that he necessarily expended the reasonable sum of $150 for attorney's fees in prosecuting the contempt proceedings in the district court and $250 in successfully resisting, at the request of the district court, a writ of review sued out of this court to annul the judgment in the contempt proceedings (see *State ex rel. Pool* v. *District Court*, 34 Mont. 259, 86 Pac. 798), and also offered to prove that he necessarily paid a notary public the sum of $18 for taking the deposition of a witness in the contempt matter, and the further sum of $8 was expended by him in going to the county seat to consult counsel as to what steps should be taken to regain possession and the use of the water taken by defendants. The cause went to trial on the so-called first cause of action, and resulted in a general verdict in favor of the defendants. From a judgment on this verdict and an order denying a new trial, plaintiff has appealed.

The only question presented for review is whether the district court was correct in holding, as a matter of law, that the plaintiff could not recover the items of special damages which he offered to prove. It is a somewhat novel question, and presents some difficulties. Indeed, the industry of counsel for neither side has been rewarded by the discovery of one just like it in the books. It is contended by the appellant that all of these sums were necessarily expended in recovering the use of the water, and should have been allowed as damages, by virtue of sections 6068 and 6069, Revised Codes, which read as follows:

"Sec. 6068. For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

"Sec. 6069. The detriment caused by the wrongful occupation of real property, in cases not embraced in sections 6070, 6076, and 6077 of this Code, or provided in the Code of Civil Procedure, is deemed to be the value of the use of the property for the time of such occupation, not exceeding five years next

preceding the commencement of the action or proceeding to enforce the right to damages, and the costs, if any, of recovering the possession."

Counsel also quote section 6071, Revised Codes, which provides that the detriment caused by the wrongful conversion of personal property "is presumed to be (2) a fair compensation for the time and money properly expended in pursuit of the property"; but we do not think this section is at all applicable to the case at bar. The following is a quotation from the appellant's brief: "Under these statutes, if the expenditure claimed be a 'detriment proximately caused' by the willful and wrongful seizure of the plaintiff's water, it is expressly declared to be legally recoverable damage. Any outlay not regained is, of course, a 'detriment.'"

The court is of opinion that proceedings for contempt are in no sense actions either for the wrongful conversion of personal property or for the wrongful occupation of real property. "The object of the power to punish by process of contempt is to enforce obedience and respect to the authority of the court." (*In re MacKnight,* 11 Mont. 126, 28 Am. St. Rep. 451, 27 Pac. 336.) The proper way for a district court to enforce its order, theretofore made, adjusting water rights between claimants entitled thereto, is by contempt proceedings upon the filing of an affidavit showing a disregard of the order. (*State ex rel. Pew* v. *District Court,* 34 Mont. 233, 85 Pac. 525.) Contempt proceedings under the Code of Civil Procedure are *sui generis,* and have most, if not all, of the characteristics of a criminal case, and few, if any, of a civil action. (*State ex rel. Boston & Montana Con. C. & S. Min. Co.* v. *Judges,* 30 Mont. 193, 76 Pac. 10.) If the person proceeded against is found guilty, a fine may be imposed on him, not exceeding $500, or he may be imprisoned not exceeding five days, or both (Revised Codes, sec. 7318). And no additional penalty may be imposed. (*In re Sutton,* 26 Mont. 557, 71 Pac. 1132.) "The proceeding in contempt is distinct from the action wherein the injunction violated was issued. Vindication of the dignity of the authority of the

court is the object to be attained in the matter, and not indemnity for the plaintiff in the civil suit. Judgment cannot go in favor of the plaintiff in the civil action had, unless authority to enter such a judgment exists by law. There is no statute granting such authority under the Codes. Nor was there power in the court to enter a judgment for costs. Statutory power to punish for contempt by fine and imprisonment for disobedience of an injunction order is limited by the manner in which the statute says the power shall be exercised. * * * The costs * * * must be paid from any fine imposed." (*State ex rel. Flynn* v. *District Court*, 24 Mont. 33, 60 Pac. 493.)

These contempt proceedings being *sui generis* and complete in themselves, it seems to follow that they cannot be changed by construction into actions for the wrongful conversion of personal property or for the wrongful occupation of real property, and consequently those statutes fixing the measure of damages in such actions have no application. When the dignity of the authority of the court has been vindicated, the proceeding has served its purpose. Moreover, those statutes refer in their terms to damages and costs which may be recovered in the same action, and it will probably not be contended that in such actions the defendant can be compelled to pay the plaintiff's attorney's fees. (13 Cyc. 80.)

The rule laid down in the case of *Plymouth Gold M. Co.* v. *United States Fidelity Co.*, 35 Mont. 23, 88 Pac. 565, is founded upon a statute commanding that, before a writ of attachment shall issue, the plaintiff must enter into a written contract with the defendant, conditioned that, if the defendant recover judgment or the court shall finally decide that the plaintiff was not entitled to an attachment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages he may sustain by reason of the issuance of the attachment. (See Revised Codes, sec. 6659.)

The learned counsel for the appellant have called our attention to other cases in which recovery of counsel fees paid was allowed as damages proximately caused by the breach of duty

on the part of the defendants. We are not prepared to say, because it is not necessary, that cases may not arise wherein attorney's fees necessarily expended may not be recovered in a second action as compensatory damages, although we think of none at present save those expressly authorized by statute. What we do hold is that contempt proceedings do not furnish a remedy available to the plaintiff for the redress or prevention of a private wrong. While such proceedings may have the result of deterring the defendants from again interfering with plaintiff's rights, still the object to be attained is vindication of the dignity of the authority of the court, and not indemnity for the plaintiff or any judgment in his favor. (*State ex rel. Flynn* v. *District Court, supra.*)

Again, it is urged that because in practice contempt proceedings are always instituted at the expense of the owner of the water, he is the one primarily interested, and should be reimbursed for his expenditures in connection therewith. It is undoubtedly true that many owners do find themselves in an unfortunate situation when their water rights are violated; but this is a subject for the legislature to deal with.

We hold that, in the absence of a statute, such expenses cannot be recovered in this action. And this applies as well to the item of $8 as to the other sums, because it is impossible to read the amended complaint and the offer of proof without arriving at the conclusion that this sum was expended in furtherance of the same general purpose as were the other sums, to-wit, to get the defendants punished for contempt of court.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE, RESPONDENT, v. DE HART, APPELLANT.

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(No. 2,599.)

(Submitted December 29, 1908. Decided February 1, 1909.)

[99 Pac. 438.]

Criminal Law—Robbery—Evidence—Admissibility—Harmless Error—Confessions—Cross-examination—Res Gestae—Rebuttal—Discretion.

Criminal Law—Evidence, Hearsay—Maps—Admissibility—Harmless Error.

1. Where defendant, charged with robbery, consented during the trial that the bailiff, in company with the prosecuting witness, might go over the route taken by the latter and defendant in the streets of a city on the night of the alleged offense, so as to enable the complaining witness, who was unfamiliar with the streets, to describe the place where the offense was committed, and the bailiff, having prepared a map of the streets traversed and indicated on it a spot pointed out by the prosecuting witness as the place where he was assaulted, thereafter testified from it, without objection, relative to the trip taken, the formal admission of the map, over defendant's objection that it was hearsay, if error, was nonprejudicial.

Same—Evidence—Motion to Strike—Waiver of Objection.

2. The court properly overruled defendant's motion to strike out the bailiff's testimony relative to what the prosecuting witness told him as to where the crime referred to in the above paragraph had been committed, the trip having been taken with his consent and no objection made at the time the evidence was received.

Same—Evidence—Refreshing Recollection.

3. The prosecuting witness had a right to refresh his memory as to where the assault was committed, by going over the route taken by himself and the defendant on the night of its commission, if by so doing he was enabled to identify the objects along the route theretofore taken by them; and his testimony thereafter as to the place was not objectionable.

Same—Exclusion of Evidence—Curing Error.

4. Alleged error in sustaining an objection to a question asked on behalf of defendant was cured where the testimony sought to be elicited was immediately thereafter given by the same witness.

Same—Evidence—Admissions—Confessions—Voluntary Character—When Immaterial.

5. Where defendant testified on the trial to practically the same matters which police officers were permitted to give in evidence touching conversations had with him after his arrest, and where it appeared that at no time did defendant admit or confess the crime with which he was charged, but consistently denied it, the contention that such evidence was inadmissible inasmuch as it amounted to a confession, and that, before admitting it, the court should have satisfied itself that the admissions contained therein were voluntarily made, has no merit. While admitting the truth of the statements, he cannot complain that they were involuntarily made.

Same—Cross-examination—Remarks of Court.

6. Where the record did not disclose that cross-examination by defendant's counsel was in fact limited, remarks of the judge commenting upon the method pursued by counsel on cross-examination in needlessly repeating questions did not constitute reversible error.

Same—Prosecuting Witness—Evidence—Friendly Feeling Toward Defendant—Immateriality.

7. Friendly feeling of the prosecuting witness toward the defendant cannot be considered by the jury in arriving at their verdict; and hence evidence that the prosecuting witness did not have defendant arrested of his own free will, and that he bore him no malice, was inadmissible.

Same—Evidence—*Res Gestae*—Erroneous Admission—When Harmless.

8. In a criminal prosecution, the erroneous admission of evidence as part of the *res gestae* was not prejudicial to defendant, where he himself on the stand admitted the very facts shown by the testimony thus erroneously admitted.

Same—Cross-examination—Scope.

9. Defendant having testified on his direct examination that he went to a certain city on the morning after the alleged robbery, a question by the county attorney whether he did not go to a different city and write a letter to a certain person was proper cross-examination, as bearing upon the truth of his statement on his examination in chief.

Same—Evidence—Admissibility—Prejudice—When Defendant may not Complain.

10. Defendant, in answering the question referred to in the foregoing paragraph, volunteered the statement that he wrote the letter in the town to which he had testified he went after the alleged offense, and from there had sent the letter to another town to be posted so as to make it appear that he had gone to the latter place. *Held*, that, if prejudice resulted from permitting the question to be answered, it was his own fault, and he could not complain.

Same—Evidence—Rebuttal—Discretion.

11. Whether matters which properly constituted a part of the state's case in chief were admissible in rebuttal lay within the sound discretion of the trial judge, and where opportunity was given defendant to meet the testimony thus adduced and abuse of discretion was not shown, the action of the court will be held proper.

Appeal from District Court, Lewis and Clark County; Thos. C. Bach, Judge.

C. H. DE HART was convicted of robbery, and appeals from the judgment. Affirmed.

Mr. H. L. Clayberg, for Appellant.

Error was committed in allowing the alleged confessions of defendant to go in without first determining whether they were given voluntarily or under duress. (*State* v. *Sherman*, 35 Mont. 512, 119 Am. St. Rep. 869, 90 Pac. 981.)

The cross-examination of a witness should be confined to matters brought out on direct examination, and to those matters only. This is especially true where the witness is the defendant in a criminal action. (*Philadelphia etc. R. R. Co.* v. *Stimpson,* 14 Pet. 461, 10 L. Ed. 535; *State* v. *Gleim,* 17 Mont. 30, 52 Am. St. Rep. 665, 41 Pac. 998, 31 L. R. A. 294; *Borden* v. *Lynch,* 34 Mont. 503, 87 Pac. 609; *People* v. *O'Brien,* 66 Cal. 602, 6 Pac. 695; *People* v. *Yeaton,* 75 Cal. 415, 9 Am. St. Rep. 216, 17 Pac. 544; *People* v. *Bishop,* 81 Cal. 113, 22 Pac. 477; *People* v. *Wong Ah Leong,* 99 Cal. 442, 34 Pac. 105; *People* v. *Baird,* 104 Cal. 464, 48 Pac. 310; *People* v. *Un Dong,* 106 Cal. 88, 39 Pac. 12; *People* v. *Gallager,* 100 Cal. 475, 35 Pac. 80; *People* v. *Arrighini,* 122 Cal. 126, 54 Pac. 591; *People* v. *O'Brien,* 130 Cal. 6, 62 Pac. 297.)

Statements made to a witness about an hour and a half after the commission of a crime were incompetent and inadmissible as not forming any part of the *res gestae.* (*State* v. *Pugh,* 16 Mont. 343, 40 Pac. 861; *People* v. *Ehring,* 65 Cal. 135, 3 Pac. 606; *People* v. *Ah Lee,* 60 Cal. 85; *People* v. *Wong Ark,* 96 Cal. 125, 30 Pac. 1115; *People* v. *Lane,* 100 Cal. 379, 34 Pac. 856.)

Mr. Albert J. Galen, Attorney General, and *Mr. E. M. Hall,* Assistant Attorney General, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

The defendant was convicted in the district court of Lewis and Clark county of the crime of robbery and appeals from the judgment. The prosecuting witness, the man alleged to have been robbed, was named Haar.

1. At the trial John F. Flannery, chief of police of Helena, a witness for the state, was asked: "Did you have any conversation with the defendant in regard to the alleged robbery of Haar?" Defendant's counsel interposed this objection: "We object. No proper foundation has been laid. There has been no proof adduced as yet as to any conversation, nor as to any offense." The objection was overruled, and the witness answered, in substance, that the defendant first denied that he

knew Haar or was in his company, but afterward acknowledged that he did know him, and said that Haar and a man had gotten into a fight on Sixth avenue, and that was how Haar got a scar on his head. It is contended in this court that the evidence was inadmissible because it amounted to a confession "made by a person under arrest to police officers or those having authority over him, without first determining the facts and circumstances surrounding the making of such confession and satisfying the court that such confessions were made fairly and voluntarily, without fear or hope of reward or benefit therefrom, or under duress of any kind or nature." We shall hereafter pass upon the merits of this contention, as applied to the facts disclosed by the record in this particular case; but here it is sufficient to say that the objection interposed did not raise the question.

2. Haar testified: That he was in a place called Steinbrenner's saloon, in Helena, about 10 o'clock of the night in question, having come from Townsend the same evening; that defendant came into the saloon, and they sat down by a table and drank some beer; afterward defendant undertook to show him a lodging-house, and they went out onto the street; that, when they got some distance off Main street, the defendant "pounded him on the head with something," and he fell down, whereupon defendant robbed him of his pocketbook, containing about $20 in money, and ran away; that he became unconscious for about an hour and later found his way back to Steinbrenner's place and washed the blood off his face. It appeared that the witness was unacquainted with the names of the streets of Helena and had some difficulty in describing the place of the assault, although he said he could go there again and had been "around there yesterday and looked and saw where it was." The court then suggested that during recess the witness should go with the bailiff "and have the place fixed so that he can give the names." To this the defendant's counsel consented, and afterward the bailiff testified that the witness went over the ground with him, pointed out the streets traversed on the night of the

alleged robbery, and finally indicated a certain spot on Fuller Avenue as looking like the place where defendant assaulted him, as near as he could remember. It appears from the record that the bailiff had made a map of the route and was testifying from it. The county attorney asked: "Have you indicated the point on the map that he indicated?" The answer was in the affirmative. Witness then testified that the map fairly represented the streets and buildings with reference to Fuller Avenue, and that a certain line on the map indicated the route which they took. All of the foregoing went in without objection, but when the map was formally offered in evidence it was objected to, for the reason that, in so far as it showed the place of the alleged assault, it was hearsay. Regardless of whether or not the objection was technically well taken, we cannot see how the defendant was prejudiced by the formal receipt of the map in evidence, after the witness had used it to illustrate his testimony and had definitely described the spot where Haar said the assault took place. Haar afterward testified that the red line on the map indicated, to the best of his recollection, the course he traveled on the night of the occurrence.

3. Defendant moved to strike out the testimony of the bailiff relating to what Haar told him as to where the assault took place; but, as the testimony was received without objection, and the trip was made with the consent of defendant's counsel, this motion was properly overruled.

4. Defendant objected to the witness Haar testifying, after he made the trip with the bailiff, as to where he was assaulted; but we see no merit in this objection. The witness had a right to refresh his recollection by going over the ground again, if by so doing he was able to identify the objects along the course theretofore taken.

5. Haar testified that he and defendant sat at a table in the saloon drinking, and that defendant saw his pocketbook at that time. Counsel for defendant then asked whether it was possible for De Hart to see the money when Haar took out the pocketbook. The court sustained an objection to the question,

and the ruling is assigned as error; but no possible prejudice could have resulted, because the witness testified immediately afterward that he did not know whether De Hart could see the money or not.

6. In addition to the testimony of the chief of police, other officers were allowed to testify that they had conversations with the defendant touching the offense with which he was charged, while he was in their custody. The defendant objected to this testimony for the reasons hereinbefore set forth. An examination of the testimony shows that at no time did the defendant admit or confess that he committed the crime of robbery. On the contrary, he denied that; but he did admit to the officers that he had a quarrel with Haar, that he had a fight with him and knocked him down. These statements may have been in the nature of admissions on defendant's part, but he himself testified at the trial that they quarreled, and he struck Haar and knocked him down. He denied that he robbed him. It is true that he did testify that he was afraid of the officers when he talked with them, but how could that fact possibly affect the verdict, when he told in court the same story told to the officers, no more and no less? While admitting the truth of the statements, he cannot complain that they were involuntarily made. We find no reversible error on this point.

7. Counsel for the defendant in his brief complains bitterly of the treatment accorded him during the trial by the district judge; but, whatever the facts may have been, the record does not disclose any conduct on the part of the judge that would warrant the conclusions drawn by counsel. A specific error complained of is this: Counsel for defendant had examined the witness Haar for some time touching the question whether De Hart could see the money in the pocketbook. Witness finally said: "Sure, the man seen it when I opened the pocketbook." The court thereupon remarked: "Now he has answered it. I will limit you to half a dozen questions, and no more. You may ask him if he went in there, if he sat down, if he had a pocketbook, if he opened it, and if they or any others were in

a position so that they could have seen if there was money in the pocketbook." Defendant's counsel objected to the language and the ruling of the court. And again: Defendant's counsel asked: "How much money did you say you had when you got to Helena?" The witness answered: "Twenty-three or four dollars. Something like that, or a little over." The court again said: "Don't ask any more questions about that amount. I think you have got that a dozen times. If you want to distinguish between $23 and $24, why go ahead." Counsel continued to cross-examine, and it does not appear that the court in fact limited the cross-examination.

8. Counsel for defendant asked Haar whether he had defendant arrested of his own free will, and the court sustained an objection to the question. Counsel then asked: "Do you bear De Hart any malice?" The court refused to allow the defendant to answer, whereupon defendant's counsel stated: "I want to show that this witness is not a willing one; that he didn't want to have De Hart arrested." This presents a new phase of the question ordinarily raised. It will be observed that counsel did not desire to show hostility, but rather the contrary. We think the court was right in holding that the friendly feeling of the prosecuting witness toward the defendant was not a matter for the jury to take into consideration in arriving at a verdict.

9. The court allowed the county attorney to prove by the bartender at Steinbrenner's that when Haar returned to the saloon he said he had been hit on the head by De Hart. The state contended that this remark was part of the *res gestae*, and the record does not inform us what the court's opinion was, aside from the fact that he allowed the testimony to go in. We do not regard it as a part of the *res gestae*. It was, viewed in the light of the other testimony, clearly a narration of a past occurrence. But, again, we find that the defendant on the witness-stand admitted the very act that Haar complained of to the bartender, no more and no less; and therefore the defendant suffered no prejudice by the admission of the testimony.

10. The court overruled the defendant's objection to the following question propounded to the bartender: "Is it not true that a man with a pocketbook in his hand, in his left pocket, standing up there by the bar, might take out that pocketbook, take out a silver dollar, and put the pocketbook back, and you not have seen it?" We find no error in this ruling.

11. Defendant complains that the court allowed the county attorney to cross-examine him in regard to matters not touched upon in his direct examination. There is no merit in this objection. Defendant had testified that the morning after the affair with Haar he went to East Helena. The county attorney inquired whether he did not go to Butte and write a letter from there to one Groseclose. This was objected to, and the objection overruled. We think the question was proper as bearing upon the truth of defendant's statement that he went to East Helena. (See *State* v. *Howard*, 30 Mont. 518, 77 Pac. 50.) But in answer to the question defendant volunteered the statement that he wrote a letter in East Helena and sent it to Butte to be posted, and he afterward testified without objection that he did so in order to make it appear that he had gone to Butte. If he was prejudiced by this testimony, it was his own fault.

12. There was no error in allowing the witness Shoemaker to testify in rebuttal to matters that properly constituted a part of the state's case in chief. This was within the sound discretion of the court. Opportunity was offered to defendant to meet the testimony if he so desired, and we find no abuse of discretion. Neither was there error in the admission of Prickett's testimony.

We find no error in the record, and the judgment must be affirmed. It appears to us that the defendant had a fair and impartial trial, and, judging from the able and exhaustive briefs filed by his counsel in this court, we have no hesitancy in saying that his rights were well protected in the court below. The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

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STATE, RESPONDENT, v. HAYES, APPELLANT.

(No. 2,614.)

(Submitted December 29, 1908. Decided February 1, 1909.)

[99 Pac. 434.]

Criminal Law—Murder—Information—Sufficiency—Conspiracy—Evidence.

Murder—Information—Sufficiency.

1. An information alleging that at a specified time and place defendant did "willfully, unlawfully, feloniously, premeditatedly and of his malice aforethought kill and murder" a certain person, was sufficient to charge murder.

Same.

2. Allegations sufficient for a common-law indictment for murder being sufficient for an information charging that crime under the statute, it was not necessary that the charging part of such pleading should set forth the facts showing how and by what means the killing was done.

Same—Conspiracy—Evidence—Sufficiency.

3. Where, on a trial for the murder of a guard in the penitentiary, the evidence showed that the object of the conspiracy between accused and certain other prisoners, was to effect an escape by force, that the disabling or killing of the officers whose presence tended to prevent the escape was a part of the conspiracy, that defendant was a party to the entire plan, and that he assaulted the warden at about the time the others were assaulting the guard, the killing of the latter was a part of the main transaction, justifying the conviction of accused for the murder.

Appeal from District Court, Powell County; Geo. B. Winston, Judge.

WILLIAM HAYES, convicted of murder, appeals from the judgment of conviction. Affirmed.

Mr. O. B. O'Bannon, and *Mr. J. H. Duffy,* for Appellant.

Mr. Albert J. Galen, Attorney General, and *Mr. W. H. Poorman,* Assistant Attorney General, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

The above-named appellant and Geo. Rock, Orem Stevens, and C. B. Young were accused of the crime of murder, alleged

to have been committed in Powell county. The charging part of the information reads as follows: "Said George Rock, William Hayes, Orem Stevens and C. B. Young did on the 8th day of March, A. D. 1908, at and in the said county of Powell, state of Montana, and prior to the filing of this information, willfully, unlawfully, feloniously, premeditatedly, and of their premeditated malice aforethought kill and murder one John Robinson, a human being, then and there being, contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the state of Montana." All the defendants were prisoners in the penitentiary, and Robinson was a guard. The accused were tried separately. At the trial of Hayes the state contended that the killing of Robinson was done while the defendants were carrying out a conspiracy, theretofore formed, to escape from the penitentiary. It is not contended that the defendant did not have a fair and impartial trial. On the contrary, counsel for the appellant say in their brief: "It will be conceded by counsel for the appellant herein that said appellant had a fair and impartial trial before a judge who zealously guarded and protected the rights of this appellant during his trial to the best of his ability. Counsel for appellant, however, feel it their duty to present the cause of the appellant to this court, to the end that the court may finally determine whether any error was committed by the trial court affecting and injuring the substantial rights of the appellant, as they exist under the law of the state. * * * It is not claimed that the trial court committed any error affecting the substantial rights of the appellant by giving the jury any of the instructions contained in the transcript." But two questions are involved:

1. Defendant's counsel objected to the introduction of any evidence, for the reasons: (a) "That the information does not state facts sufficient to constitute a public offense or crime. (b) It does not state facts sufficient to constitute murder in any degree. (c) It does not state facts sufficient to constitute any crime included within the crime of murder. The information

does not substantially comply with the provisions of sections 1832-1834 of the Penal Code 1895 (Revised Codes, secs. 9147-9149)." Under the ruling of this court in *State* v. *McGowan*, 36 Mont. 422, 93 Pac. 552, the information was sufficient in itself to charge murder. But it is contended that in this case the information should set forth facts showing how and by what means the actual killing was accomplished. This point was also decided in *State* v. *McGowan, supra*. We think the information was sufficient.

2. It is contended that the evidence does not disclose a conspiracy to kill Robinson, but only to effect an escape, and that, as it fails to show that appellant killed Robinson, he could not be legally convicted of murder because the killing was not included in the conspiracy. The evidence shows that Robinson was actually killed by Rock, or Rock and Stevens. It is conceded that there was a conspiracy on the part of "some of appellant's codefendants" to effect an escape from prison; but, say counsel, "this falls far short of establishing the conspiracy contended for, to-wit, a conspiracy on the part of the appellant and his codefendants to kill Robinson." We have carefully examined the record. No specific testimony was given fixing the scope or range of the conspiracy, but to our minds it clearly appears from the evidence that the object of the conspiracy was to effect an escape from the penitentiary by force, that the disabling or killing of all officers of that institution whose presence tended to interfere with the design or prevent its success was a part of the conspiracy, and that Hayes was a party to the entire plan of procedure. He assaulted the warden at about the time Rock and Stevens were assaulting Robinson. In this view, the killing of Robinson, to use the language of this court in *State* v. *Howard*, 30 Mont. 518, 77 Pac. 50, was "a part of the main transaction."

The judgment of the district court and the order denying a new trial are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. HOLLOWAY concur.

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ROBINSON, RESPONDENT, v. HELENA LIGHT AND RY. CO., APPELLANT.

(Nos. 2,594 and 2,660.)

(Submitted December 19,,1908. Decided February 6, 1909.)

[99 Pac. 837.]

Personal Injuries—Carriers—Street Railways—Bills of Exceptions—Misnomer—Amendments—Variance—Instructions—Exceptions—Review—Annuity Tables—Evidence.

Bill of Exceptions—Certificate—Misnomer—Effect.

1. A bill of exceptions in support of a motion for a new trial was prepared in conformity with the requirements of the Act of 1907 (Laws 1907, p. 89), was entitled and served as such, and opposing counsel in acknowledging service designated it as a bill of exceptions, and after service, offered and had incorporated in it certain amendments. It was submitted to the judge as a bill of exceptions, and the certificate referred to the document as being "allowed, settled and signed as and for a true and correct copy of the proceedings of the trial," etc. In the certificate of settlement, however, counsel for movant designated the document as a "statement on motion for new trial." *Held* that, under the circumstances, the mere misnomer of the document was not sufficient ground for striking the bill from the record on appeal.

Same—Amendments After Appeal—Power of District Court.

2. While the district court has power to amend its records so as to speak the truth, its authority in this regard does not extend to the amendment of an order after it has lost jurisdiction by the taking of an appeal from it; hence an order amending a certificate to a bill of exceptions, erroneously therein designated a statement on motion for new trial, so as to give it its proper title, which order was made pending appeal, was error.

Personal Injuries—Street Railways—Immaterial Variance.

3. Where in a personal injury action against a street railway company the complaint alleged that plaintiff in attempting to board a street-car was injured by the car suddenly moving *forward*, and the evidence revealed the fact that he was thrown from the car by a *backward* movement, and it did not appear that defendant was misled or its counsel surprised by this technical departure in the proof, the court properly overruled a motion for a new trial on the alleged ground of variance. (Revised Codes, sec. 6585.)

Variance—Question not Raised on Motion for New Trial—Effect.

4. A claim of variance between the pleadings and proof, which was not called to the trial court's attention on a motion for new trial, may not be urged for the first time on appeal as error in denying the motion.

Personal Injuries—Simple Negligence—Complaint—Waiver of Defect.

5. Where the complaint in an action for personal injuries, after stating a cause of action for simple negligence, contained a paragraph characterizing the conduct of defendant as "willful" and reckless (which clause might have been omitted without affecting the cause of action theretofore stated), thus by the use of the word "willful"

injecting an element of ambiguity and indefiniteness into the pleading, defendant, by answering, waived this defect; and, plaintiff not having introduced any evidence tending to furnish ground for an inference of wanton or willful wrong, a motion for nonsuit on the ground that the evidence, showing ordinary negligence only, did not support an allegation of intentional injury, was properly denied.

Same—Complaint—Willful Negligence—Proof of Simple Negligence.

6. *Obiter:* An allegation in a complaint in an action to recover damages for personal injuries that the wrong was willful or wanton will not support recovery upon proof of simple negligence only.

Same—Street Railways—Carrier and Passenger—Evidence—Insufficiency.

7. Defendant street railway company operated an electric line from a city to a point outside the city limits, where it had erected a platform for the convenience of passengers from and at which to board and leave the cars. Plaintiff, with knowledge that the car he was about to board was not in its proper place at the platform, undertook to do so from a direction where he could not be seen and without notice to the motorman or conductor. In doing so he was thrown from the car by a sudden movement to its place at the platform, and injured. *Held*, that, under these circumstances, the relationship of carrier and passenger was not established, and that defendant owed plaintiff no duty until its employees had notice of his presence.

Same—Street Railways—Platforms—Failure of Passenger to Use—Effect.

8. Where one about to board a street-car outside of the city limits fails to make use of a platform provided by the carrier for the means of ingress and egress of passengers to and from its cars, and he is injured, he cannot recover, since the high degree of watchfulness which the carrier must exercise toward passengers is not due to those who do not avail themselves of the means provided for accepting the invitation extended by the carrier to take passage, but adopt means of their own choice.

Instructions—Review—Exceptions Necessary.

9. Error assigned to the giving of an instruction may not be reviewed on appeal where the record shows that counsel merely "objected" to its being given, but did not reserve an exception to the action of the court in overruling the objection, as required by section 6746, Revised Codes.

Same—Review—Bill of Exceptions.

10. Since the adoption of section 6746, Revised Codes (Laws 1907, p. 62), the whole charge, or such parts of it as will illustrate the point upon which the objecting party relies as error in the charge as well as instructions requested and refused, should be incorporated in a bill of exceptions to insure review on appeal.

Personal Injuries—Mortality and Annuity Tables—Conclusiveness—Evidence—Erroneous Instruction.

11. An instruction charging the jury, unqualifiedly, in a personal injury action, that they could award to plaintiff such an amount as would purchase an annuity equal to the difference between what he could have earned if he had not been injured, and what he could earn in his injured condition, was erroneous. While standard mortality and annuity tables are competent evidence in such cases, they are not conclusive guides to the jury in awarding damages. In having recourse to them a variety of circumstances should be considered, such as advancing age and consequent diminished earning capacity, plaintiff's health, habits, etc.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by Alvin Robinson, a minor, by W. H. Hirst, his guardian *ad litem*, against the Helena Light and Railway Company. Judgment for plaintiff, and defendant appeals from it and an order denying it a new trial. Reversed and remanded.

Messrs. Carpenter, Day & Carpenter, for Appellant.

In an action for damages resulting from personal injuries the plaintiff cannot recover on any other theory than that alleged in his complaint; and if a general allegation of negligence is followed by an enumeration and averment of specific acts, the plaintiff will be confined to proof of the negligence specifically assigned. (*Chicago Union Tract Co.* v. *Leonard*, 126 Ill. App. 189; *Denver Con. E. Co.* v. *Walters*, 39 Colo. 301, 89 Pac. 815; *McCoy* v. *Carolina Cent. R. Co.*, 142 N. C. 383, 55 S. E. 270; *McGrath* v. *St. Louis Transit Co.*, 197 Mo. 97, 94 S. W. 872.) While he need not prove every specific act of negligence alleged, he must at least prove actionable negligence in some respect as alleged in his complaint, and not merely make a case of negligence which is not within the theory of his complaint. (*Terre Haute etc. R. Co.* v. *McCorkle*, 140 Ind. 613, 40 N. E. 62; *Wormsdorf* v. *Detroit City Ry. Co.*, 75 Mich. 472, 13 Am. St. Rep. 453, 42 N. W. 1000.) Where the complaint alleges a violation of a certain duty, and the proof shows, if anything, the violation of another duty, the variance is material though the resulting injuries are identical. (*Augusta Ry. & Elec. Co.* v. *Weekly*, 124 Ga. 384, 52 S. E. 444; *Plunkett* v. *Central of Georgia Ry. Co.*, 105 Ga. 203, 30 S. E. 728; *Louisville & N. A. & C. R. Co.* v. *Renicker*, 8 Ind. App. 404, 35 N. E. 1047; *Birmingham Elec. R. Co.* v. *Clay*, 108 Ala. 233, 19 South. 309; *Santa Fe P. & R. Co.* v. *Hurley*, 4 Ariz. 258, 36 Pac. 216; *North Birmingham S. R. Co.* v. *Calderwood*, 89 Ala. 247, 18 Am. St. Rep. 105, 7 South. 360; *Pierce* v. *Great Falls & Canada Ry. Co.*, 22 Mont. 445, 56 Pac. 867; *Denver & R. G. R. Co.* v. *Cahill*, 8 Colo.

App. 158, 45 Pac. 285.) Where the gravamen of the charge is of a willful or malicious injury, it cannot be sustained by proof of mere negligence, however great. (*Chicago, B. & Q. R. Co.* v. *Dickson,* 88 Ill. 431; *Indiana B. & W. R. Co.* v. *Burdge,* 94 Ind. 46; *Montgomery* v. *Muskegon Boom Co.,* 88 Mich. 633, 26 Am. St. Rep. 308, 50 N. W. 729; 2 Abbott's Trial Brief, "Pleadings," 1680.)

The allegation of negligence proper and willful misconduct are inconsistent, and proof of mere negligence is not sufficient to support a complaint alleging the act to be willful. (*Rideout* v. *Winnebago Trac. Co.,* 123 Wis. 297, 101 N. W. 672, 3 Street Ry. Rep. 943, 69 L. R. A. 601, and note.) There can be no such thing as "willful negligence" or "reckless negligence" without actual knowledge of plaintiff's peril. (*Anderson* v. *Minneapolis etc. R. Co.,* 103 Minn. 224, 114 N. W. 1123, 14 L. R. A., n. s., 886; *Parker* v. *Pennsylvania Co.,* 134 Ind. 673, 34 N. E. 504, 23 L. R. A. 552; *Cleveland* v. *Miller,* 149 Ind. 490, 49 N. E. 445.)

The relationship of passenger and carrier is one of contract. Like other relationships based on contract, it may be inferred from the circumstances surrounding the case. But these circumstances must fully justify the inference that the person has boarded the car or presented himself as a passenger and been accepted as such by the carrier. (Clark's Accident Law, 2d ed., chapters 1, 2; *Lewis* v. *Houston Electric Co.,* 39 Tex. Civ. App. 625, 88 S. W. 489, 112 S. W. 593; 4 Street Ry. Rep. 1032, and note; *Nathan* v. *New York City Ry. Co.,* 91 N. Y. Supp. 35; *Gomez* v. *New York City Ry. Co.,* 105 N. Y. Supp. 108; *McCarty* v. *St. Louis & S. R. Co.,* 105 Mo. App. 596, 80 S. W. 7.) There is no negligence on the part of the company in a slight movement of the car while the plaintiff is in the act of boarding, and no presumption of negligence from the mere happening of the accident. Negligence cannot be proved by mere conjecture as to how it happened. (*Weber* v. *New Orleans & C. R. Co.,* 104 La. 367, 28 South. 892; *Schmeltzer* v. *St. Paul City Ry. Co.,* 80 Minn. 50, 82 N. W. 1092; *Stager* v. *Ridge Ave. P.*

Ry. Co., 119 Pa. 70, 12 Atl. 821; *Morris* v. *Lake Shore etc. Ry. Co.*, 148 N. Y. 182, 42 N. E. 579.)

Mr. Wm. Wallace, Jr., *Mr. J. G. Brown*, and *Mr. R. F. Gaines*, for Appellant.

Plaintiff in attempting to board the car was on the wrong side and the wrong end of it, and in attempting to do so, he gained no rights as a passenger; but assumed the risk of such action, and was guilty of contributory negligence in so doing. Had he, under like conditions, attempted to board the train of a steam railroad, he unquestionably would have been not a passenger, but simply a trespasser, toward whom no duty would have been owing save not to willfully or wantonly injure him. (*Cleveland etc. Ry. Co.* v. *Wade*, 18 Ind. App. 346, 48 N. E. 12, 16-18; *Wardlaw* v. *California Ry.* (Cal.), 42 Pac. 1075, 1076; *Louisville etc. Ry.* v. *Ricketts*, 96 Ky. 44, 27 S. W. 860; *McGeehan* v. *Lehigh Valley Ry.*, 149 Pa. 188, 24 Atl. 205; Fetter on Carriers, sec. 228, pp. 596, 597; citing *Jones* v. *Boston etc. Ry.*, 163 Mass. 245, 39 N. E. 1019; *Henry* v. *St. Louis etc. Ry.*, 76 Mo. 228, 43 Am. Rep. 762; *Haase* v. *Navigation* Co., 19 Or. 354, 24 Pac. 238; *Denver etc. Ry.* v. *Pickard*, 8 Colo. 163, 6 Pac. 149; *Georgia Pac. Ry.* v. *Robinson*, 68 Miss. 643, 10 South. 60; *Chicago etc. Ry.* v. *Meyers*, 80 Fed. 346, 25 C. C. A. 486; Booth on Street Railway Law, sec. 329; see, also, *Malpass* v. *Hestonville etc. Ry. Co.*, 189 Pa. 599, 42 Atl. 291; *State* v. *Lake Boland Elevated R. R. Co.*, 84 Md. 163, 34 Atl. 1130, 1131; *Gaffney* v. *St. Paul City Ry.*, 81 Minn. 459, 84 N. W. 304, 305.)

The court gave the jury an erroneous rule of compensation for impaired earning capacity, in directing them that they might award therefor such a sum as would purchase an annuity in amount equal to his loss of earnings annually for the balance of his expected life. Expectancy tables are merely an aid to a jury in arriving at the probable duration of the life of the one particular person with whom they are alone concerned, and if they feel that, by reason of specific conditions affecting him, he would not conform to the average shown by the tables, they cannot rightly

fit the tables arbitrarily upon him; nor can they be rightly told they may do so. (See *Vicksburg etc. Ry.* v. *Putnam,* 118 U. S. 545, 7 Sup. Ct. 1, 30 L. Ed. 257; *Rooney* v. *New York etc. Ry. Co.,* 173 Mass. 222, 53 N. E. 435; *Morrison* v. *McAtee,* 23 Or. 530, 32 Pac. 400; *Nelson* v. *Lake Shore etc. Ry.,* 104 Mich. 582, 62 N. W. 993; *Goodhart* v. *Pennsylvania Ry.,* 177 Pa. 1, 55 Am. St. Rep. 705, 35 Atl. 191; *Trott* v. *Chicago etc. Ry.,* 115 Iowa, 80, 86 N. W. 35, 87 N. W. 722; *Seifred* v. *Pennsylvania Ry.,* 206 Pa. 399, 55 Atl. 1061; *Campbell* v. *City of York,* 172 Pa. 205, 33 Atl. 879; *Kerrigan* v. *Pennsylvania Ry.,* 194 Pa. 98, 44 Atl. 1071; *Florida etc. Ry. Co.* v. *Burney,* 98 Ga. 1, 26 S. E. 739; *Galveston etc. Ry. Co.* v. *Johnson,* 24 Tex. Civ. App. 180, 58 S. W. 624; *City of Joliet* v. *Blower,* 155 Ill. 414, 40 N. E. 619; *Mary Lee Coal etc. Ry. Co.* v. *Chambliss,* 97 Ala. 171, 11 South. 898; *Birmingham etc. Ry. Co.* v. *Wilmer,* 97 Ala. 165, 11 South. 888; *Crouse* v. *Chicago etc. Ry.,* 102 Wis. 196, 78 N. W. 450; *Roose* v. *Perkins,* 9 Neb. 304, 31 Am. Rep. 409, 2 N. W. 715; *Illinois Central Ry.* v. *Houchins,* 121 Ky. 526, 123 Am. St. Rep. 205, 89 S. W. 530, 1 L. R. A., n. s., 375; *Smiser* v. *State ex rel. King,* 17 Ind. App. 519, 47 N. E. 229; *Hunn* v. *Michigan etc. Ry.,* 78 Mich. 513, 44 N. W. 502, 78 L. R. A. 500; *Friend, City of,* v. *Ingersoll,* 39 Neb. 717, 58 N. W. 281; *McKeigue* v. *City of Janesville,* 68 Wis. 50, 31 N. W. 298; *Harrison* v. *Sutter St. Ry.,* 116 Cal. 156, 47 Pac. 1019; 20 Am. & Eng. Ency. of Law, 2d ed., p. 887; 8 Ency. of Ev. 643.

Messrs. Clayberg & Horsky, for Respondent.

The complaint alleged in substance that the car by which the plaintiff was injured stopped at its usual place for discharging and receiving passengers; and that plaintiff was in the act of mounting the same, and that while endeavoring to so mount, the car was suddenly "started up," throwing him under the wheels and injuring him. We submit that the words "started up," used in their ordinary meaning, include "starting backward" as well as "starting forward." Starting a car simply means putting it in motion, and the phrase "started up" is sufficiently

comprehensive to include in its meaning the putting of the car in motion either ahead or backward. Hence there was no variance in this regard. The gist of the cause of action was the failure of defendant to keep the car stationary until plaintiff could mount it; whether it went backward or forward is no part of the negligence alleged. Appellant would be liable for negligently starting the car too soon, in either direction. (*Cincinnati etc. Ry. Co.* v. *Ravalee*, 17 Ind. App. 657, 46 N. E. 352; *Lake Shore etc. Ry. Co.* v. *Hundt*, 140 Ill. 525, 30 N. E. 458; *Southern Bell Tel. Co.* v. *Lynch*, 95 Ga. 529, 20 S. E. 500; *Texas & Pac. Ry. Co.* v. *Williams*, 62 Fed. 440, 10 C. C. A. 463; *Steinke* v. *Bentley*, 6 Ind. App. 663, 34 N. E. 97; *Nord* v. *Boston & Mont. Con. C. & S. Min. Co.*, 30 Mont. 48, 75 Pac. 681.) The variance, if any, was immaterial. (Revised Codes, sec. 6585.) Counsel waived the variance, if material: (a) By not claiming at the trial that they were misled to their prejudice (*Vreeland* v. *Edens*, 35 Mont. 413, 89 Pac. 735); (b) By notice of plaintiff's position as disclosed by the testimony of the witness Hilliard, taken before defendant's answer was filed; and (c) By not demurring to the complaint on the ground of ambiguity, or making a motion for a more specific statement.

Inasmuch as counsel for both parties tried the case in the court below upon the theory of ordinary negligence and compensatory damages, it is now too late for counsel for appellant to insist that the judgment should be reversed because plaintiff failed to make any proof of willful and wanton character of the negligence alleged. Investigation of the authorities cited by counsel for appellant will disclose that the decisions are variant upon the question as to whether plaintiff may recover for ordinary negligence, under a complaint in which willful or wanton negligence is alone alleged; most of them holding that, if negligence is alleged, it is for the jury to determine the degree of negligence—that is, whether ordinary, gross or willful—and therefore, where willful negligence is alleged in the complaint, the jury may find that the negligence was ordinary. (*Pendley* v. *Illinois Central Ry. Co.*, 28 Ky. Law Rep. 1324, 92 S. W. 1; *Cincinnati etc. Ry. Co.* v. *Cooke's Admr.*, 113 Ky. 161, 67 S. W.

383; *Richmond & Co.* v. *Farmer*, 97 Ala. 141, 12 South. 86; *Louisville etc. Ry. Co.* v. *Black*, 89 Ala. 313, 8 South. 246; *Montgomery etc. Ry. Co.* v. *Stewart*, 91 Ala. 421, 8 South. 708; *Hays* v. *Gainsville St. Ry.*, 70 Tex. 602, 8 Am. St. Rep. 624, 8 S. W. 491; *Keating* v. *Detroit Ry. Co.*, 104 Mich. 418, 62 N. W. 575; *Richter* v. *Harper*, 95 Mich. 221, 54 N. W. 768.)

Counsel for appellant insist that we allege willful negligence because the word "reckless" is used in connection with the statement of the negligence of the defendant. The word "recklessness" thus used cannot be given the meaning of "willfulness." (*Highland Ave. Ry.* v. *Sampson*, 112 Ala. 425, 20 South. 566; *Kansas City etc. Co.* v. *Crocker*, 95 Ala. 412, 11 South. 262; *Cleveland etc. Ry.* v. *Tartt*, 64 Fed. 823, 12 C. C. A. 618; *Eddy* v. *Powell*, 49 Fed. 814, 1 C. C. A. 448; *Greathouse* v. *Croan*, 4 Ind. Ter. 668, 76 S. W. 273; *Dull* v. *Cleveland etc. Ry.*, 21 Ind. App. 571, 52 N. E. 1013.)

As to the relation of passenger and carrier, where a person attempts to mount a street-car under the circumstances as disclosed in this record, he is a passenger and entitled to protection as such. (*Cohen* v. *West Chicago Street Ry. Co.*, 60 Fed. 698, 9 C. C. A. 223; *Dudley* v. *Front Street Cable Co.*, 73 Fed. 128; *Barth* v. *Kansas City Ry.*, 142 Mo. 535, 44 S. W. 778; *Kellegher* v. *Forty-second St. Ry.*, 171 N. Y. 309, 63 N. E. 1096; *North Chicago St. Ry. Co.* v. *Cook*, 145 Ill. 551, 33 N. E. 958; *Walters* v. *Phila. Traction Co.*, 161 Pa. 36, 28 Atl. 941; *Redington* v. *Harrisburg Traction Co.*, 210 Pa. 648, 60 Atl. 305; *Normile* v. *Wheeling Traction Co.*, 57 W. Va. 132, 49 S. E. 1030, 68 L. R. A. 901.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by the plaintiff, a minor, through a guardian *ad litem*, for damages for a personal injury alleged to have been suffered by him through the negligence of the defendant. Plaintiff had verdict and judgment. Defendant has appealed from the judgment and an order denying it a new trial.

The defendant owns and operates an electric railway constructed over and along certain streets in the city of Helena, and extending from the city to Ft. Harrison, situated several miles to the northwest, and is a common carrier of passengers. Between the city and Ft. Harrison there is a single line of track. At the latter place the track is laid in the form of a circular loop, returning into itself by means of a switch. To make the return trip to the city the cars are run around the loop and reach the main line again at the switch. A short distance beyond the switch, on the outside of the loop and at a point at which passengers bound to and from Ft. Harrison can most conveniently reach or leave the cars, the defendant has a small platform, six by eight feet, for their accommodation, the roadbed at this point being considerably higher than the general level of the surrounding country. From the level of the roadbed up to the step of the car in use at the time the accident is alleged to have occurred was twenty-one inches. On the evening of April 15, 1906, the plaintiff, an enlisted soldier stationed at Ft. Harrison, wishing to board a car which was on its way around the loop and about to return to the city, attempted to do so as it was brought to a stop near the platform. The motorman in charge had allowed it to run too far, so that the front door was a few feet beyond the platform, and, in order to accommodate persons desiring to leave or enter, it was necessary to move it forward or backward, so that the front or rear door would be opposite the platform, because, the car being about thirty feet in length, the passengers could not otherwise use the platform. He undertook to back it up to the platform so that passengers could reach it from the front door. Just at that time, according to plaintiff's own statement, he had approached the car from the inside of the loop intending to enter it by the rear door. He had grasped the handle and put one foot upon the step. While in the act of drawing up his other foot, the car suddenly moved, causing him to lose his hold and footing, and to fall under the wheels, which crushed his leg near the ankle, with the result that he was permanently injured.

The complaint charges: "(6) That in the operation, management, guidance, and control of said street-car at the time and place hereinafter mentioned, the said defendants acted in a careless and negligent manner, in this, to-wit: That on the fifteenth day of April, 1906, on the said loop portion, and at the terminus of said corporation's said track at Ft. Harrison, one of its cars had, on making the trip from the city to the said fort, come to a full stop to permit passengers to alight and board said car, which said car had come from said city, and was about to commence its return trip from said fort to said city; that said Robinson, desiring and intending to board said car, so at a full stop, as aforesaid, and become a passenger for hire thereon, proceeded to board said car, so at a full stop, as aforesaid, and put one foot upon the footboard at the side of the rear platform of said car, at the same time grasping the handle of the car with one of his hands, and while he thus had one foot on the footboard, as aforesaid, and in the act of drawing up the other, but before he had or was afforded the time or opportunity to, or could, draw up his other foot, and during all of which time, while said Robinson was proceeding to board said car, both the motorman and the conductor were standing on the opposite or front platform of said car, and did not look back at or observe said rear end of the car, the said car, through the negligence, carelessness and recklessness of said defendants, suddenly and without warning to this plaintiff, and without affording him time or opportunity to complete the act of boarding said car, as aforesaid, started up with great force and violent speed, and that by reason of the defendants' said negligence, carelessness and recklessness, said Robinson, without fault or negligence on his part, and while using due care and diligence, was caused to be violently thrown and precipitated with great force to the ground, and underneath one of the rear wheels of said car, and was thereby run over by said car, and both of the rear wheels of said car were derailed, the front wheels remaining on the track; and that, solely by reason of the said defendants' negligence, carelessness, and recklessness, both bones of

said Robinson's right leg at the ankle joint were fractured, splintered, broken, and crushed. * * * "

"(7) And plaintiff further avers, upon his information and belief, that in so operating, running, and driving and managing said street-car at the time and place aforesaid, and in causing the injuries so sustained by the said Robinson, as aforesaid, the said defendants acted in a willfully and recklessly negligent manner, and without any regard to their duty in the premises, and without any regard to the safety and rights of the said Robinson."

The answer denies all the allegations charging negligence on the defendant's part, and alleges contributory negligence on the part of the plaintiff. At the opening of the trial the defendant objected to the introduction of evidence by plaintiff, on the ground that it appeared from the opening statement of his counsel to the jury that he was seeking to recover upon proof of a cause of action not alleged in the complaint, and of which the defendant had had no notice, in that counsel claimed that the injury occurred while the car was on its outward trip to Ft. Harrison and while it was backing up to the platform, whereas it is alleged in the complaint that the car had reached the platform, and was starting on its return trip. The motion was overruled. At the close of plaintiff's case defendant moved to strike out the testimony of plaintiff and another witness, the ground of the motion being the same as that of the motion to exclude the evidence at the close of counsel's statement. It also moved for a nonsuit, alleging several grounds therefor, all of which are included in the general statement: That there was a variance between the allegations in the complaint and the proof, and that from any point of view the evidence did not make out a *prima facie* case of negligence on the part of the defendant. These motions were denied. It is now contended that a new trial should have been granted because of error in these rulings, and also, in others made during the trial upon questions of evidence and in instructing the jury. It is also contended that the evidence as a whole, apart from the material variance between

the cause of action which is alleged, and that which plaintiff sought to prove, is insufficient to justify the verdict.

The defendant's bill of exceptions in support of the motion for a new trial was prepared, in conformity with the requirements of the statute, as a bill of exceptions. It was entitled and served as such. The acknowledgment of service by plaintiff's counsel designated it as such; and, after service, they offered and had incorporated in it certain amendments. In the preparation of the certificate of settlement—which is in the form of an order—counsel for defendant designated it as a "statement on motion for new trial." Apparently the trial judge attached his signature without paying attention to this designation. Upon the filing of the record in this court counsel for plaintiff submitted a motion to strike from it the whole of the bill, on the ground that it had not been settled in conformity with the requirements of the statute. They also submitted a motion, designating the document as an alleged "statement on motion for new trial," and asked to have it stricken out on the ground that the statute does not authorize a statement as the basis of a motion for a new trial. Pending these motions, counsel for defendant applied to the district court for an order to amend the certificate so as to make it designate the document as a "bill of exceptions," and thus to conform to the fact. The court granted the order, and amended the certificate; and, upon written suggestion to this court, an order was made permitting the record on appeal to be amended accordingly, subject, however, to lawful objection by respondent upon the hearing of the cause on the merits. Disposition of the motions was deferred until that time. From the order made by the district court permitting the amendment, plaintiff appealed. By agreement of counsel this appeal has been submitted for decision, together with the principal appeals.

Inasmuch as we may not consider the questions sought to be presented by the principal appeals unless the bill of exceptions is properly in the record, for they all arise out of proceedings which must have been brought into it by a bill of exceptions,

we shall take up first the questions presented by the motions and the separate appeal. Is the certificate so defective that the document designated as a "bill of exceptions" must be stricken out or disregarded? And, if so, had the district court, pending the appeal from the order, the power to amend it so as to make it conform to the requirements of the statute? Prior to the passage of the Act of February 26, 1907 (Session Laws 1907, p. 89), a motion for a new trial might be made either upon a statement of the case or a bill of exceptions (Code Civ. Proc. 1895, sec. 1172), at the option of the movant. The statement was in form a bill of exceptions, except as to the specifications of matters upon which the movant intended to rely (Code Civ. Proc. 1895, sec. 1173), but it was made up after notice of intention to move for a new trial had been served and filed, and was settled as such. A bill of exceptions was made up during the trial, or within ten days after notice of the entry of judgment, or within such time as the court or judge might allow. (Code Civ. Proc. 1895, secs. 1154, 1155.) A bill of exceptions could also be made up and settled after notice of intention had been served and filed, to be used as the basis of the motion, in the same manner as a statement was used. (Code Civ. Proc. 1895, sec. 1173.) The same course of procedure in the preparation of a bill may be pursued under the Revised Codes (Revised Codes, secs. 6787, 6788, 6796). Since the passage of the Act of February 26, 1907, there has been no provision in the Code authorizing a statement of the case to be used as the basis of the motion. The statement referred to in this Act as a part of the record on appeal (Revised Codes, sec. 6799) is to be made up after a motion for a new trial has been disposed of. Such being the provisions of law applicable, the certificate or order of settlement in this case does not properly designate the document to which it is attached. The objection made to it, however, is exceedingly technical. As stated above, it is entitled a "bill of exceptions." Service of it was made as such. As shown by the recitals contained in it, it was submitted to the judge as a bill of exceptions, and apparently in the considera-

tion of the motion it was regarded as a proper basis for the motion. Besides, the certificate itself refers to the document as being "allowed, settled, and signed as and for a true and correct copy of the proceedings of the trial," etc. In *Harris* v. *Tomlinson,* 130 Ind. 426, 30 N. E. 214, the supreme court of Indiana refused to sustain an objection to a bill of exceptions wherein the words "testimony" and "offered" were used, instead of the appropriate terms "evidence" and "introduced." Touching the misuse of the first of these terms, the court said: "We cannot permit the simple misuse of a word, where the meaning is obvious, to defeat the operation of an instrument of such importance as a bill of exceptions." The use of the word "offered" for "introduced" was deemed of no merit, since the record showed the sense in which the former was used. Even though no designation had been used in the certificate, we apprehend that no objection would have been made to it in this court. Under the circumstances we do not think the objection should be deemed meritorious. The motions to strike are therefore overruled.

In this disposition of the motions we have proceeded upon the theory that a motion to strike is the proper course to pursue in order to have the record purged of matters which should not have been incorporated in it. This procedure was recognized in *Mettler* v. *Adamson et al., ante,* p. 198, 99 Pac. 441, with reference to papers which are not part of the record in the lower court. Counsel for appellant insists that the motion should be denied, because it is the rule, well recognized by the decisions of this court, that a document which is a part of the record in the lower court, and which has been properly certified to this court as a part of the record on appeal, such as a bill of exceptions or statement on motion for new trial, however defective it may be for any reason appearing on the face of it, may not be stricken out, but must remain in the record; the effect to be given to it being a matter for consideration upon the hearing of the cause on the merits. This is the recognized rule. (*Beach* v. *Spokane R. & W. Co.,* 25 Mont. 367, 65 Pac. 106;

Kranich v. *Helena Con. Water Co.,* 26 Mont. 379, 68 Pac. 408.) Since disposition had to be made of them, however, we have treated them as if the question really at issue was properly raised by them.

The conclusion we have arrived at would obviate the necessity of discussing the action of the district court in amending the certificate, were it not that the question involved is presented by a separate appeal, which must be disposed of. We are of the opinion that the court erred in this regard. When the bill of exceptions was settled and ordered filed, it, including the certificate, became a part of the record to be used on the motion for new trial. The disposition of the motion was made upon this record. Therefore, so long as the order stood, the record should not have been changed, for the result was the substitution of a new record as the basis of an order already made. The trial court has power to amend its records so as to make them speak the truth. (*Power & Bro., Ltd.,* v. *Turner,* 37 Mont. 521, 97 Pac. 950.) It probably has the power, upon timely application presenting meritorious grounds therefor, to set aside an order disposing of a motion for new trial, and then to amend the bill of exceptions, provided a case is made which permits of such an amendment. Another order may then be made upon the basis thus furnished, and this is the orderly course of procedure. But after appeal from the order the court cannot amend it or set it aside, for it has lost jurisdiction over it for any purpose. The review in the appellate court must be made upon the same record upon which the order was made. The same or analogous questions have frequently been brought to the notice of the courts, and the decisions generally support the conclusions above stated. The principle running through them all is that the determination of the trial court, whether technically a judgment or order, fixes for the time being the status of the parties, and the right to the relief sought by the appeal is predicated upon the condition of the record at the time the determination was reached. The following cases are in point: *Hynes* v. *Barnes,* 30 Mont. 25, 75 Pac. 523; *Baker* v. *Borello,* 131 Cal. 615, 63 Pac. 914; *Merced Bank* v. *Price,* 152 Cal. 697.

93 Pac. 866; *Thomas* v. *Sullivan*, 11 Nev. 280; *Lamburth* v. *Dalton*, 9 Nev. 64; *Dean* v. *Pritchard*, 9 Nev. 232; *Riley* v. *Chicago, M. & St. P. Ry.*, 71 Minn. 425, 74 N. W. 171; *Moore* v. *Reid*, 110 Ga. 248, 34 S. E. 211. In *Thomas* v. *Sullivan, supra*, the trial judge had attached his certificate to the statement on motion for a new trial after the motion had been disposed of and an appeal taken from the order. The court disregarded the statement, saying: "This certificate having been made after the district court had lost jurisdiction of the case for that purpose, we are compelled to wholly disregard the statement to which it is affixed; and, as there is nothing to support the order granting a new trial, it must be reversed." If a certificate may not be supplied where there is none, certainly, and for the same reason, one so defective as to be nugatory may not be amended. The order authorizing the amendment is reversed. The order of this court permitting the record in this court to be amended upon suggestion of counsel should not have been made.

Passing now to the consideration of the merits, we inquire, first, whether the defendant should have been granted a new trial on the ground of the alleged variance between the proof and the allegations of the complaint. The contention is that the evidence does not tend to support the specific acts of negligence pleaded (a) as to the time of the accident; (b) as to the manner of its occurrence; and (c) as to the relationship of the parties. It is also said that the complaint alleges that the injury was caused by the willful and reckless negligence of the defendant, and that there is a further variance, in that the evidence tends to show only simple negligence. The last two of these specifications have to do rather with the insufficiency of the evidence to justify the verdict, and will be examined hereafter when we come to look into the evidence upon this point.

The complaint alleges that the accident occurred when the car, "on making the trip from the city to the said fort, had come to a full stop to permit passengers to alight and board said car, which said car had come from said city, and was about to commence its return trip; * * * that said Robinson, desiring and intending to board said car, so at a full stop," proceeded

to do so, but that the car, before he had time to board it, started up with great force and violent speed, causing him to be thrown under one of the rear wheels. The testimony of plaintiff is to the effect that the car on its return trip had run beyond the platform; that he had attempted to board it, having approached it from the inside of the loop and at the rear door, and that, while engaged in doing so, having one foot upon the step, and being in the act of raising up the other, the car suddenly moved backward, causing him to lose his hold and throwing him under the rear wheels. He did not notice whether the passengers were getting off the car. He noticed that the motorman was in the forward part of the car, but did not see the conductor at all. He did not call the attention of either one of them to the fact that he was about to board the car. He had been stationed at Ft. Harrison since some time during the previous month. Terrence, a witness for the plaintiff, and the only other who testified as to any of the particulars of the accident, corroborated him in his statement as to the movement of the car, stating, further, that he stepped off the car and walked back to the platform. Upon reaching it he heard plaintiff's outcry, and discovered him lying near the rear of the car, on the opposite side of the road. Hilliard, another witness, testified that it was customary for passengers to alight from the front end of the car at this station; that on this occasion the front end of the car was allowed to pass about four feet beyond the platform; that when it stopped, some one said it would have to be backed up; and that it was backed up six or eight feet, so that the front door was opposite the middle of the platform. From the other evidence it appeared that no one on board the car knew of the presence of the plaintiff until after he had been hurt.

Does this evidence tend to establish a case different in substance from that alleged? It varies from it in putting the accident, in point of time, after the car had stopped and began to move backward in order to discharge its passengers, instead of after this had been done and it was moving forward on the return trip to the city, and in revealing the fact that the plaintiff was thrown from it by a sudden backward movement in-

stead of a forward movement. But, since the defendant had notice of the time and place of the accident, and of plaintiff's claim that he was thrown from the car by its sudden movement, what substantial ground is there for the conclusion that defendant was misled to its prejudice by this technical variance? The station was the end of the run. What difference could it make to defendant, in its effort to meet the charge, whether the car was moved backward or forward? The statute declares: "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." (Revised Codes, sec. 6585.) Also: "Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs." (Revised Codes, sec. 6586.) It does not appear that the defendant was misled so that it did not have present any witness that it would otherwise have had, or that counsel was surprised in the least. They did not make this contention at the trial, but only that the variance was substantial, insisting that the evidence did not tend to establish exactly the cause of action alleged, and hence that there was a failure of proof. The trial court overruled their contention as being without merit, and we think the ruling was correct. (*Vreeland* v. *Edens*, 35 Mont. 413, 89 Pac. 735.)

The gist of the cause of action alleged is that the defendant was guilty of negligence in failing to keep the car stationary until the plaintiff could board it. Whenever a passenger is about to board a car, under circumstances as to time and place such as that it can be said that he has been invited by the carrier to do so, the latter is guilty of negligence if time is not given him. The question for trial was whether the defendant had invited the plaintiff to board the car at the time he attempted to do so, and as he attempted to do it, and whether he was allowed the time necessary for that purpose; but whether the car was moved backward or forward was a mere detail in the occurrence resulting in the injury, and no claim of substan-

tial variance can be predicated upon it. (*Nord* v. *Boston & Mont. Con. C. & S. Min. Co.*, 30 Mont. 48, 75 Pac. 681; see, also, *Lake Shore & M. S. Ry. Co.* v. *Hundt*, 140 Ill. 525, 30 N. E. 458; *Cincinnati, H. & I. R. Co.* v. *Revalee*, 17 Ind. App. 657, 46 N. E. 352; *Southern Bell T. & T. Co.* v. *Lynch*, 95 Ga. 529, 20 S. E. 500; *Steinke* v. *Bentley*, 6 Ind. App. 663, 34 N. E. 97.) Under such circumstances the defendant is not entitled to a new trial. (Revised Codes, sec. 6593; *Poindexter & Orr Live Stock Co.* v. *Oregon Short Line Ry. Co.*, 33 Mont. 338, 83 Pac. 886.) The case of *Pierce* v. *Great Falls & C. Ry. Co.*, 22 Mont. 448, 56 Pac. 867, cited by counsel, is not in point. In that case it was declared by this court to be the rule that, while general allegations of negligence on the part of the carrier are sufficient to sustain the action, yet when the particulars in which the negligence consisted are alleged, plaintiff in making his proof must confine himself to the limitations to which he has thus restricted the issue. This must be so, otherwise the defendant would be held upon proof of a cause of action of which he had no notice. And this is the general rule, as shown by the cases cited by appellant's counsel; but it has no application to the facts of this case. In all of these cases there was a substantive departure in the evidence from the cause of action declared on, and this was properly regarded as a failure in the proof. These remarks dispose of the motion made by counsel, at the close of plaintiff's case, to strike out his testimony and that of the witness Terrence, on the ground that it did not tend to support the specific cause of action alleged.

The last two particulars in which it is claimed that there was a departure in the proof were not called to the attention of the trial court under this head, and may not be urged in this behalf for the first time in this court. (*Nord* v. *Boston & Montana Con. C. & S. Min. Co.*, 30 Mont. 48, 75 Pac. 681; *Dawes* v. *Great Falls*, 31 Mont. 9, 77 Pac. 309.) In fact they do not present the question whether there was a variance, but are rather particulars wherein, from the point of view of defendant's counsel, the evidence failed to make out the cause of action alleged,

to-wit, that plaintiff was a passenger on one of defendant's cars, and was injured by the willful negligence of defendant's servants; for the argument is that the court erred in refusing to sustain the motion for nonsuit and to direct a verdict for defendant, on the ground that the relation of passenger and carrier was not shown by the evidence, and that evidence furnishing an inference of ordinary negligence only does not support an allegation of intentional injury, as imported by the use of the terms "willful" and "reckless," characterizing the negligence alleged in paragraph 7 of the complaint. Noticing the last point first, it may be observed that the plaintiff introduced no evidence furnishing ground for an inference of wanton or willful wrong by defendant's servants; nor was it necessary, from any point in view for him to do so, under the allegations contained in the sixth paragraph of the complaint. The word "reckless" does not imply willfulness. The term means "heedless, careless, rash, indifferent to consequences." One may be heedless, rash or indifferent without intending the consequences of his action. (*Kansas City etc. R. R.* v. *Crocker,* 95 Ala. 412. 11 South. 262.) The allegations contained in the seventh paragraph might have been omitted altogether, without affecting the cause of action already stated. At best the use of the word "willful" in the last paragraph serves only to render the pleading indefinite and ambiguous in its statement of the cause of action, and this defect could have been taken advantage of by special demurrer only. Doubtless the trial judge entertained the view that, after issue joined, the pleading, ambiguous in its allegations, should be construed most favorably to plaintiff, and this course was correct, for the rule is that by answering defendant waives defects of this character (Revised Codes, sec. 6539); and, when question is thereafter made as to the purport of the pleading, it will be construed to state a cause of action, if upon any reasonable theory this may be done. Omitting the last paragraph of the complaint, it must be construed to state a cause of action for simple negligence. The question presented by the motions did not arise directly upon the sufficiency of the

pleading, but a solution of it required a construction of the pleading, and, under a just application of the rule adverted to, the contention of counsel was properly overruled.

The rule contended for by counsel that where the allegation is of willful or wanton wrong, proof of simple negligence will not justify a recovery is, we think, founded upon correct reason, and is supported by the great weight of authority. (29 Cyc. 588; *Chicago B. & Q. Ry. Co.* v. *Dickson*, 88 Ill. 431; *Wilson's Admx.* v. *Chippewa Valley Ry. Co.*, 120 Wis. 636, 98 N. W. 536, 66 L. R. A. 912; *Kansas etc. R. R. Co.* v. *Crocker*, 95 Ala. 412, 11 South. 262; *Louisville, N. A. & C. Ry. Co.* v. *Bryan*, 107 Ind. 51, 7 N. E. 807.) But counsel are not in position to invoke it in this case.

The contention that the evidence did not establish the relation of passenger and carrier must, we think, be sustained. The substance of the testimony of plaintiff and the witness Terrence has already been stated. As already pointed out, these were the only witnesses who attempted to state any of the details of the accident. From the testimony of the conductor and motorman it appears that the intention was to stop the car with the front door at the platform, so that the passengers could leave it by that door. From the testimony of some of the passengers this was the customary way of placing the car at this station, and this fact must have been known to plaintiff. The motorman, upon finding that he had run by the platform, reversed the current and backed the car to the proper position. Naturally the conductor was at the front end of the car to discharge his duty in looking after the passengers leaving and boarding it. Naturally, also, he could expect passengers leaving and boarding it to use the means provided by the company for that purpose. Without notice of the fact that a person was seeking to get on board from the opposite side and through the rear door, neither he nor the motorman was bound to turn their attention in that direction. All the witnesses agree that the car was derailed, either as it backed up to the platform, or as it started on around the loop on the return trip, and that the plaintiff

was not discovered by anyone until after this occurred. It is not important, however, when the derailment took place. The important point is that the plaintiff undertook to board the car at a moment when he knew it was not at its proper place, from a direction from which he could not be seen, and without notice to the motorman or conductor, so that they could look after his safety. Had he, under similar circumstances, undertaken to board a train on a steam railway, he would not have been a passenger, but rather in the position of a trespasser, to whom the company would not have owed any duty until it had notice of his presence.

In *Wardlaw* v. *California Ry. Co.* (Cal.), 42 Pac. 1075, the facts were that the plaintiff approached a train from the wrong side, and attempted to board it by a means other than the steps provided for that purpose. In doing so he put his foot upon the bumper of the car just in time to have it caught between it and the bumper of the next car as the engineer started to back the train, and was thus injured. In speaking of the duty of passengers to use platforms provided for them by a railway company the court said: "It is the duty of a railway company, as a common carrier of passengers, to keep its stations and the approaches thereto in such a condition that those having occasion to use them for the purposes for which they are designed may do so with safety. So, too, the duty devolves upon it of preparing all proper means of ingress and egress to and from its cars devoted to the carriage of passengers. This duty performed by the railroad company, the reciprocal duty devolves upon one who would take passage by the cars to use his natural faculties in selecting such means and place of access thereto as have been provided for that purpose, and as promise immunity from danger. Not to do so is evidence of negligence on the part of the passenger; and where, as in the present case, the plaintiff went upon the side of the car opposite to the platform, and presumably not the place arranged to receive passengers, and, finding no place of access, attempted to climb upon the train, from between the cars, with the barrier of a railing be-

fore him to be scaled when he reached the level of the car floor, and in so doing placed his foot upon the bumper, where it was caught by the connecting car, pressed back by the engine moving up to couple on the train, but one inference can be drawn from the facts, and that is that he was guilty of such negligence as is denominated negligence in law." The rule here announced is laid down by the authorities generally. (1 Fetter on Carriers, sec. 228; *Georgia Pac. Ry. Co.* v. *Robinson,* 68 Miss. 643, 10 South. 60; *Louisville & N. R. Co.* v. *Ricketts,* 96 Ky. 44, 27 S. W. 860; *McGeehan* v. *Lehigh Valley St. Ry. Co.,* 149 Pa. 188, 24 Atl. 205; *Cleveland, C., C. & St. L. Ry. Co.* v. *Wade,* 18 Ind. App. 346, 48 N. E. 12; *Denver, S. P. & P. R. Co.* v. *Pickard,* 8 Colo. 163, 6 Pac. 149; *Haase* v. *Oregon Ry. & Nav. Co.,* 19 Or. 354, 24 Pac. 238; *Jones* v. *Boston & Maine R. R.,* 163 Mass. 245, 39 N. E. 1019.) It applies as well to persons leaving trains, as is shown by the cases cited. It is based upon the obviously just principle that the very high degree of watchfulness which the carrier must exercise toward those who have intrusted themselves to its care at its own invitation is not due to those who are not invited to do this, or who, if invited, do not avail themselves of the means provided by which they may accept the invitation, but adopt means of their own choice. It is not permissible for street railway companies to provide platforms, and other like conveniences, along the streets. The graded or paved streets furnish the only platform from which cars may be boarded. The places at which they stop may be designated by the ordinances of the city. If there be no such ordinances or public statutes on the subject, the companies regulate their own conduct in this regard. Whenever and wherever they do stop their cars, and they are so equipped as to indicate that they are ready to receive passengers, and are about to proceed on their way to transport them, this must be regarded as an invitation to anyone desiring to become a passenger to enter. But when the track runs beyond the limits of the city, through uneven, open country, it is generally necessary for the company to designate

stations and to provide platforms so that the cars can be reached without inconvenience and danger. Under these circumstances the principles which apply to steam railways apply to them also, and the duties and liabilities of those operating them are the same, because, excepting the fact that they must perhaps provide for more frequent stops, the circumstances and responsibilities are the same. (Booth on Street Railway Law, sec. 329; *Udell* v. *Citizens' Street Ry. Co.*, 152 Ind. 507, 71 Am. St. Rep. 336, 52 N. E. 799; *State to the Use etc.* v. *Lake Roland Elevated Ry. Co.*, 84 Md. 163, 34 Atl. 1130.)

Under the undisputed facts in this case the car had not stopped at the usual place for taking on and discharging passengers. This fact must have been known to plaintiff, for presumably he was aware of the custom pursued by the company at this station. At any rate, knowing the car had passed the station, he paid no attention to this fact, but, going to the opposite end from that intended for the use of passengers, without giving notice to those in charge of it, he undertook to board it. Whether the inference to be drawn from these circumstances is that he assumed the risk, or was guilty of contributory negligence, the blame rests with him, and he cannot recover.

Among the instructions submitted to the jury was the following: "(14) In determining the amount which you may award to the plaintiff on account of any diminished capacity for the work or labor because of his injuries, if you believe them to be permanent, you may take into consideration his expectancy of life, and you may award him such sum on that account as will purchase an annuity equal to the difference between what he could have earned if he had not been injured and what he can now earn in view of his injuries." Counsel for defendant "objected" to the giving of this, for the reason that it is a comment upon the weight of the evidence, and explicitly told the jury that they should award to the plaintiff such an amount as would purchase an annuity equal to the difference between what he could have earned if he had not

been injured and what he could earn in his injured condition. It is insisted by counsel for plaintiff that the error assigned upon this instruction is not properly before this court for examination, because it does not appear from the record that a formal exception to the giving of the instruction was reserved in the trial court after the objection had been overruled.

Under section 6746, Revised Codes, at the settlement of the instructions as therein provided, counsel must state his objection to the particular instruction, and, if the objection is overruled, reserve his exception. The language of the section confuses the meaning, to some extent, of the terms "objection" and "exception"; but orderly procedure requires an exception after the objection has been disposed of, in order to enable counsel to urge the action of the court thereon on motion for a new trial, or on appeal, as in case of all other rulings that are regarded as objectionable, and to which exception must be taken. Technically, therefore, counsel for defendant have no right to have this court review the action of the trial court in this particular. Since, however, the question presented is of some importance, and a new trial must be ordered for the reason already stated, we shall venture to indicate briefly our views.

Before doing so, however, we shall notice another objection made to the consideration of the question presented by the assignment, viz., that the instructions given and refused are not in the judgment-roll, as required by the section cited *supra*, but are found only in the bill of exceptions, and therefore that none of them are before us for examination. Section 6784 declares what matters are deemed excepted to without formal exception embodied in a bill. Among them are the instructions. Section 6806 declares what the judgment-roll shall contain, the enumeration therein, including the matters deemed excepted to and made part of the record without a formal bill of exceptions. Section 6746 declares that all instructions, both those given and those refused, shall be indorsed by the judge and filed as a part of the record in the case. This section was enacted by the tenth legislative assembly (Session Laws 1907, p. 62), but seem-

ingly without attention to, or notice of, the provisions in sections 6784 and 6806. Prior to the passage of this Act a review of the instructions could be had upon appeal from the judgment, either with or without the aid of a bill of exceptions bringing up the evidence. It will be seen, however, that by the express provisions of section 6746 the instructions may not be reviewed without a bill of exceptions specifically pointing out the particular objection made at the time of the settlement; so that, while they are a part of the record, they really serve no useful purpose on the appeal. Section 7112, however, requires only those parts of the judgment-roll which are necessary to be considered on the appeal to be brought up in the transcript. Hence the bringing up of the instructions can serve no useful purpose if the bill of exceptions taken at the settlement is made up in conformity with the requirements of section 6785, so as to present intelligibly the point upon which the appellant relies.

In view of the provisions of section 6746, requiring a bill of exceptions in order to obtain a review of the instructions, and the requirements of section 6785 referred to, we hold that the proper course to pursue is to incorporate in the bill the whole charge, or such parts of it as will illustrate the point upon which the objecting party relies. The provisions of sections 6784 and 6806 have become obsolete, so far as they include the instructions as a part of the record for review, without a bill of exceptions embodying the objections of the party to the action of the court thereon. This rule applies, also, to instructions requested and refused. The instruction complained of, together with the rest of the charge, both the paragraphs given and those refused, are properly in the bill of exceptions.

Coming, then, to consider the contention of counsel for defendant, we are of the opinion that the instruction is open to the objection that it does not declare the correct rule as to the use to be made by the jury of the mortality and annuity tables in arriving at the amount of their verdict. The instruction follows closely the language employed by this court in *Bourke*

v. *Butte Electric Power Co.*, 33 Mont. 267, 83 Pac. 470, in discussing the propriety of using mortality and annuity tables as a definite standard by which to fix the amount of compensation for the impairment of earning capacity in personal injury cases. What was there said was not necessary to a decision of the case. It was the subject of comment in the later case of *Lewis* v. *Northern Pacific Ry. Co.*, 36 Mont. 207, 92 Pac. 469, and the suggestion was there made that, when earning capacity depends upon physical strength, the jury should also be advised that they should consider the fact that as age advances physical strength and earning capacity diminish, and that their finding should be made accordingly. The suggestion made in the latter case was in the decision of the question whether the verdict was excessive, and did not arise upon the propriety of an instruction. Whether the remarks in either of these cases were pertinent or not, the intention was not to lay down a fixed standard or rule by which the jury should be governed. A variety of circumstances must always enter into the consideration of the jury in adjusting the amount of damages to be allowed for impairment of earning capacity. Mortality and annuity tables are competent evidence, and, generally speaking, the only substantive evidence that can be submitted to aid the jury in arriving at a just conclusion. For this reason the average man would be inclined to resort to it as the easiest means of solving the difficult problem before him, to-wit, how much will compensate the plaintiff for his loss of earning capacity. So, if reference is made in the instructions to this feature of the evidence at all, it should not be made in such terms, as in the instruction before us, as to leave room for the conclusion that these tables must be accepted as a fixed standard of computation by which the jury are to be governed absolutely. In addition to impairment of earning capacity by advancing age many other things are proper for consideration as elements in the problem. The office of these tables and the other matters to be considered together with them are well stated by the supreme court of Oregon, in *Morrison* v. *McAtee*, 23 Or. 530, 32

Pac. 400, as follows: "Standard mortality tables, showing the expectation of life of a given age, are competent for the purpose of showing the probable length of life of any given person, but, in the nature of the case, cannot be conclusive. They are simply the result of calculations, based upon a certain average rate of mortality as shown by experience, and assuming that all of the same age are of equal value. But the constitution, habits, and health of individuals differ essentially, and this must be taken into consideration in estimating the probable length of life of any given person, and therefore no ordinary table of expectation of life, although it may offer much valuable information, can alone be taken as a correct rule for estimating the value of the life of any particular individual."

In commenting upon an instruction on this subject, the supreme court of the United States, in *Vicksburg etc. Ry. Co.* v. *Putnam*, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. Ed. 257, said: "Life and annuity tables are framed upon the basis of the average duration of the lives of a great number of persons. But what the jury had to consider in this case was the probable duration of plaintiff's life and of the injury to his capacity to earn his livelihood. Upon the evidence before them it was a controverted question whether the injury would be temporary or permanent. The instruction excepted to, either taken by itself or in connection with the whole charge, tended to mislead the jury by obliging them to ascertain the average injury to the plaintiff's capacity by the year, whether the extent of that injury would be constant or varying, and by giving them to understand that the tables were not merely competent evidence of the average duration of human life, and of the present value of life annuities, but furnished absolute rules which the law required them to apply in estimating the probable duration of plaintiff's life and the extent of the injury which he had suffered."

An instruction formulated so as to embody the suggestions here made would not be open to any objection, and would aid the jury, so far as the court may aid it, in reaching a just con-

clusion. For a discussion of the subject generally, reference is made to the following cases: *Rooney* v. *New York etc. Ry. Co.*, 173 Mass. 222, 53 N. E. 435; *Nelson* v. *Lake Shore Ry. Co.*, 104 Mich. 582, 62 N. W. 993; *Trott* v. *Chicago etc. Ry. Co.*, 115 Iowa, 80, 86 N. W. 33, 87 N. W. 722; *Roose* v. *Perkins*, 9 Neb. 304, 31 Am. Rep. 409, 2 N. W. 715; *Harrison* v. *Sutter St. Ry. Co.*, 116 Cal. 156, 47 Pac. 1019; *Florida etc. Ry. Co.* v. *Burney*, 98 Ga. 1, 26 S. E. 730; *City of Joliet* v. *Blower*, 155 Ill. 414, 40 N. E. 619; *Smiser* v. *State*, 17 Ind. App. 519, 47 N. E. 229.

The other assignments are not of sufficient merit to demand special notice.

The judgment and order are reversed, with directions to the district court to grant the defendant a new trial.

Reversed and remanded.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

Rehearing denied March 10, 1909.

STATE EX REL. QUINTIN, APPELLANT, *v.* EDWARDS, MAYOR, ETC., RESPONDENT.

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(No. 2,598.)

(Submitted December 22, 1908. Decided February 8, 1908.)

[99 Pac. 940.]

Municipal Corporations—Police Commission—Statutes—Constitutionality—Status of Policemen—Removal—Powers of Mayor—Mandamus.

Police Commission Act—Policemen—Extending Term of Office—Constitution—Provision Inapplicable.

1. Section 31 of Article V of the Constitution, which declares that no law shall extend the term of any public officer, etc., does not apply to the provision of the Act of 1907 (Laws 1907, p. 344, creating a police commission in cities and towns), that an officer then serving on the force may be reappointed, such appointment to hold during good

behavior or until the incumbent shall become incapacitated—thus practically insuring to such officer an indeterminate tenure—since prior to his appointment under the provisions of the Act, he is obliged to pass an examination and serve a probationary period of six months, the same as any other applicant for such a position.

Same—"Special Commission"—Constitutional Provision Inapplicable.

2. The Act establishing a police commission in cities and towns (Laws 1907, p. 344) does not violate section 36, Article V of the Constitution, declaring that the legislature shall not delegate to any special commission power to make, supervise or interfere with any municipal improvement, etc., or perform any municipal function whatever. The board thus created, *held*, not to be a "special commission" within the meaning of this section of the Constitution.

Same—Status of Policemen—State Officers.

3. A policeman is not a state officer. He is a public officer in the sense that he has certain duties to perform other than those strictly pertaining to the government of the municipality for which he is acting.

Same—Policemen—"Municipal" Officers—Servants—Employees.

4. Strictly speaking, a policeman is not a "municipal" officer—that is, a "city" officer—as that term is used in section 16, Article VI of the state Constitution, declaring that the legislative assembly may provide for the election and appointment of such municipal officers as public convenience may require, but that their term of office shall not in any case exceed two years; nor is such officer a mere servant or employee of the municipality.

Same—Policemen—Removal—Powers of Mayor.

5. *Held*, that section 14 of the Act establishing a police commission in cities and towns, which repeals all Acts and parts of Acts in conflict with the provisions of the legislation, and then declares that nothing therein contained shall abridge any of the powers possessed by the mayor under any other provision of law or any ordinance, does not reserve to the mayor the power of suspension and removal he theretofore possessed under section 3250, Revised Codes, but takes from him such right.

Appeal from District Court, Lewis and Clark County; W. R. C. Stewart, Judge, presiding.

APPLICATION by the state, on the relation of Moses Quintin, for a writ of *mandamus* against Frank J. Edwards, as mayor of the city of Helena. From a judgment for defendant relator appeals. Reversed and remanded.

Mr. W. J. Pigott, and *Mr. Massena Bullard*, for Appellant.

Policemen are officers of the state. The police board is an agency of the state. Police commissioners are in fact state officers, not municipal, though they be appointed by the city and the city be taxed to pay them. (*Davock* v. *Moore*, 105

Mich. 120, 63 N. W. 424, 28 L. R. A. 783; *People* v. *Reilly*, 53 Mich. 260, 18 N. W. 849; *Taylor* v. *Philadelphia Board of Health*, 31 Pa. 73, 72 Am. Dec. 724; *State* v. *Covington*, 29 Ohio St. 102; *State* v. *Kolsem*, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; *Roddy* v. *Finnegan*, 43 Md. 505; *Burch* v. *Hardwicke*, 30 Gratt. 24, 32 Am. Rep. 640; *Buttrick* v. *City of Lowell*, 1 Allen, 172, 79 Am. Dec. 721; *People* v. *Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *Everill* v. *Swan*, 17 Utah, 514, 55 Pac. 68; *Ex parte Tracey* (Tex. Cr.), 93 S. W. 538; *Wright* v. *Chicago*, 60 Ill. 312; *Farrell* v. *Bridgeport*, 45 Conn. 191; *Norristown* v. *Fitzpatrick*, 94 Pa. 121, 39 Am. Rep. 771; *Horton* v. *City etc. of Newport*, 27 R. I. 283, 61 Atl. 759, 1 L. R. A., n. s., 512, 518; 28 Cyc. 497, and cases there cited; *State* v. *Mason*. 153 Mo. 23, 54 S. W. 524; *State* v. *Police Commissioners*, 34 Mo. 546.)

Should the court hold the foregoing position to be untenable then we contend: Policemen are not municipal officers within the meaning of section 6, Article XVI, Constitution, but are mere employees or servants. The purpose of the legislative assembly to make policemen and members of a police force employees rather than officers is clearly manifested by the enactment of the police bill, even if it is not, as we think it is, clearly revealed in the Political Code as originally adopted. The title of the bill itself negatives the intention to make policemen and members of the police force officers. Throughout the bill the intention seems to be apparent to provide for the employment of policemen rather than to provide for the appointment of such persons as municipal officers.

The officers of the police department of a city of the first class are the chief of police and the members of the examining and trial board of the police department, who, as provided by section 4 of the police bill, "shall hold office for two years and until their successors are appointed and qualified." These constitute the officers of the police department. All other persons mentioned in the police bill as connected with the police department are members, and because of the language used in

defining their attitude to the department, they are employees of the department.

That the word "officer" is not limited in application to persons who occupy official positions is well understood, for the word is often used to designate one who holds a public station or employment. (See *United States* v. *Hartwell*, 6 Wall. 385, 18 L. Ed. 830; *United States* v. *Maurice*, Fed. Cas. No. 15,747, 2 Brock. 96; *Butler* v. *Regents*, 32 Wis. 124; *Hall* v. *Wisconsin*, 103 U. S. 5, 26 L. Ed. 302; *Vaughn* v. *English*, 8 Cal. 40.)

That a policeman is not a municipal officer within the intent of the legislative assembly or the meaning of the Constitution, see *People* v. *Cain*, 84 Mich. 223, 47 N. W. 484; *Commonwealth* v. *Stokely*, 4 Pa. Co. Ct. Rep. 334, 20 Week. Not. Cas. 315, and other cases first above cited.

But if the court should hold against both contentions made above, then we contend: If a policeman is a municipal officer within the meaning of the constitutional provision invoked, and if it was unconstitutional to prescribe a term longer than two years, the police bill is nevertheless constitutional in so far as a two-year term is concerned. (*State* v. *Long*, 21 Mont. 26, 52 Pac. 645; *Proctor* v. *Blackburn*, 28 Tex. Civ. App. 351, 67 S. W. 548; *Cawthon* v. *City of Houston*, 31 Tex. Civ. App. 1, 71 S. W. 329; *City of Paris* v. *Cabiness*, 44 Tex. Civ. App. 587, 98 S. W. 925; *People* v. *Hurlburt*, 24 Mich. 44, 9 Am. Rep. 103.)

Mandamus is the proper remedy for the reinstatement of appellant, whether he be an officer or an employee of the city. (*Thompson* v. *Troup*, 74 Conn. 121, 49 Atl. 907; 26 Cyc. 253, 257, 260; 28 Cyc. 447, 552; Spelling on Extraordinary Remedies, sec. 1576; *Pratt* v. *Board of Police Commissioners*, 15 Utah, 1, 49 Pac. 747, 750.)

Mr. Edward Horsky, for Respondent.

The police commission bill is repugnant to the Constitution in providing for a tenure "for life," in excess of the two-year constitutional limitation. "During good behavior" is the equivalent of "during life." (*In the Matter of Hennen*, 13

Pet. (U. S.) 230, 259, 10 L. Ed. 138; *Blake* v. *United States*, 103 U. S. 227, 26 L. Ed. 462; see, also, *People* v. *Perry*, 79 Cal. 105, 21 Pac. 423.) From the last case cited it will be seen that it cannot be successfully contended by the relator that the law would be valid for an appointment for two years and void as to the excess. The decision covers the very point mentioned. It is there also said with relation to a constitutional provision much like our section 6, Article XVI: "The argument of counsel for respondent, that this section of the new Constitution refers exclusively to officers mentioned in the Constitution itself, and not to officers of statutory creation, is ingenious, but not convincing." (See, also, *Estate of Mahoney*, 133 Cal. 182, 85 Am. St. Rep. 155, 65 Pac. 389; *Ex parte Keeney*, 84 Cal. 304, 24 Pac. 34; *State* v. *Johnson*, 123 Mo. 51, 27 S. W. 399; *People* v. *Newman*, 96 Cal. 608, 31 Pac. 564.) That a policeman is an officer, see *Jacksonville* v. *Allen*, 25 Ill. App. 54; *Thornton* v. *Missouri & P. R. Co.*, 42 Mo. App. 58; 23 Ency. of Law, 2d ed., 322-325; *Shelby* v. *Alcorn*, 36 Miss. 273, 72 Am. Dec. 169, note 179, 188, 189; *Cawthon* v. *City of Houston*, 31 Tex. Civ. App. 1, 71 S. W. 329; *Brown* v. *Russell*, 166 Mass. 14, 55 Am. St. Rep. 357, 43 N. E. 1005, 1010, 32 L. R. A. 253; *Dempsey* v. *New York Central & H. R. Co.*, 146 N. Y. 290, 40 N. E. 867; *Woodhull* v. *City of New York*, 150 N. Y. 450, 44 N. E. 1038, 1039; *Proctor* v. *Blackburn*, 28 Tex. Civ. App. 351, 67 S. W. 548. A policeman is primarily a municipal officer, and *ex-officio* (under the Penal Code) a peace officer, and not a state officer. That the members of police boards are not state officers, see *City of Louisville* v. *Wilson*, 99 Ky. 598, 36 S. W. 944; *Mayor of Savannah* v. *Grayson*, 104 Ga. 105, 30 S. E. 693; *Attorney General* v. *Connors*, 27 Fla. 329, 9 South. 7; *Barnes* v. *District of Columbia*, 91 U. S. 540, 23 L. Ed. 440.

Much of the confusion that has arisen in more recent years in differentiating between who are municipal officers as such and who are officers of the state, has arisen from the use of certain language used in the earlier decisions, in determining

whether the city was liable for certain torts of officers. The doctrine laid down in 2 Dillon on Municipal Corporations, Fourth Edition, section 975, that "police officers appointed by a city are not its agents or servants so as to render it responsible, etc.," does not mean that therefore they are not primarily officers of the city, as such. The decisions in more recent years base the question of the city's liability or nonliability for officers' particular acts, not upon the question as to whether an officer, as such, is one of the city or one of the state, but upon the nature of the duty which he was performing.

The decisions are uniform, even though it was merely a violation of the city ordinances, that an officer in making an arrest of the offender for such violation, is nevertheless, regarded as performing a public duty concerning the public at large, and thereby the municipality is not liable. That a city is not liable for torts of its police officers for arrest for violation of ordinances. see the following cases: *Culver* v. *City of Streator,* 130 Ill. 217, 22 N. E. 810; *Calwell* v. *City of Boone,* 51 Iowa, 687, 33 Am. Rep. 154, 2 N. W. 614; *Stinnett* v. *Sherman* (Tex. Civ. App.), 43 S. W. 847; *Vaughtman* v. *Town of Waterloo,* 14 Ind. App. 649, 43 N. E. 476; *Taylor* v. *City of Owensboro,* 98 Ky. 271, 56 Am. St. Rep. 361, 32 S. W. 948; *Whitfield* v. *City of Paris,* 84 Tex. 431, 31 Am. St. Rep. 69, 19 S. W. 566, 15 L. R. A. 783. That a municipal corporation is not liable for the torts of its ordinary employees or servants, such as drivers of a sprinkling cart, etc., while performing public duties, see *Conelly* v. *City of Nashville,* 100 Tenn. 262, 46 S. W. 565; *Culver* v. *Streator,* 130 Ill. 217, 22 N. E. 810.

The very essence of this entire police bill, its design, its extent, and its purpose, was to afford a tenure for life. But this is just what the Constitution interdicts. "When the main object of the statute in question is unconstitutional, and the other provisions are connected therewith, all parts of a single scheme, permeating the entire act, the whole fails, and it cannot be adjudged good in part and void in part. It must stand or fall together." (*City of Rochester* v. *Briggs,* 50 N. Y. 553; *People*

v. *Kenney*, 96 N. Y. 294; *New York & L. I. Bridge Co.* v. *Smith*, 148 N. Y. 540, 42 N. E. 1088; Cooley's Constitutional Limitations, 4th ed., 215; *People* v. *Porter*, 90 N. Y. 68; *Jones* v. *Jones*, 104 N. Y. 234, 10 N. E. 269; *Allen* v. *Louisiana*, 103 U. S. 80, 26 L. Ed. 318; *Poindexter* v. *Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 29 L. Ed. 185; *Warren* v. *Mayor etc. of Charlestown*, 2 Gray, 84; *Slauson* v. *Racine*, 13 Wis. 398; *State ex rel. Houston* v. *Perry County Commrs.*, 5 Ohio St. 497; *Allen County Commrs.* v. *Silvers*, 22 Ind. 491.)

MR. JUSTICE SMITH delivered the opinion of the court.

This is an appeal from a judgment of the district court of Lewis and Clark county entered in favor of the respondent after the court had sustained a general demurrer to the affidavit for a writ of mandate, and had granted a motion to quash an alternative writ theretofore issued. The affidavit filed by the relator alleges, in substance, as follows: Since May 1, 1908, the respondent, Frank J. Edwards, has been, and still is, mayor of the city of Helena, a city of the first class. The relator, Quintin, was a patrolman of the city at the time of the passage of Chapter 136, page 344, Laws of 1907, commonly called the "Police Commission Bill," approved March 7, 1907. On July 6, 1907, the then mayor appointed relator, who was duly qualified, to the position of patrolman on the police force for the probationary term of six months. Thereafter relator successfully passed examination by the "examining and trial board of the police department," and received from it a certificate that he was qualified for appointment upon the police force, and on March 23, 1908, the then mayor duly appointed him to the position or place of policeman or patrolman to hold during good behavior or until by age or disease he should become permanently incapacitated; whereupon he at once qualified and took the oath required of members of the police force, and ever since has been, and still is, a member of the force, to-wit, a policeman or patrolman, and has not become incapacitated and no charge whatsoever has been brought against him. The respondent mayor did on

June 3, 1908, unlawfully and contrary to the statute in that behalf enacted, and without power or jurisdiction so to do, discharge him from the force, and under color of the office of mayor ordered that he be forthwith discharged and precluded from using or enjoying his right and position as policeman, and be prevented from performing any duty or service as such. He objected to being discharged, and has always since held himself in readiness to perform his duties and has demanded that he be reinstated, but the mayor has refused to reinstate him. He prays that the mayor be compelled to do so.

In the brief of counsel for the appellant the statement is made that three ultimate questions are presented: First, whether or not the police commission bill is altogether null because repugnant to the state Constitution; second, if it is not void in its entirety, whether or not it is void in so far as it provides for the holding of positions of policemen for more than two years; and, third, if the bill is invalid in the respect last mentioned, whether or not that part of the bill which forbids the dismissal, without charges or trial, of policemen appointed to hold during good behavior until incapacitated, is effective to prevent, within two years next following such appointment, dismissal by the mayor without charges or trial. The so-called police commission bill provides for a police department in every city and town within Montana, such department to be under the charge and supervision of the mayor, who shall appoint all the members and officers. The members of the force shall be appointed for the probationary term of six months, and the mayor may then appoint them to hold during good behavior or until by age or disease they become permanently incapacitated. In cities of the first class the mayor shall appoint three residents as a board to be known as "the examining and trial board of the police department," to hold office for two years. Each applicant for a position on the force shall first undergo an examination, and, if he receives a certificate from the board, he is eligible to appointment for a probationary period of six months and may thereafter be appointed to hold during good behavior and

until incapacitated. Jurisdiction is conferred upon the board to try and decide all charges brought against any member or officer of the police department, and it is provided that no member or officer of the police force shall be discharged without a hearing or trial before the board, but the mayor and the chief of police, subject to the approval of the mayor, shall have the power to suspend a policeman or any officer under the chief for a period not exceeding ten days in any one month without a hearing or trial. Vacancies in the force shall be filled from the list of persons eligible to appointment. Members of the police department at the time of their appointment shall not be less than twenty-one years of age nor more than fifty, but this restriction does not apply to anyone who was a member of the police department when the bill was passed. Section 14 repeals all Acts and parts of Acts inconsistent with the provisions of the bill, and concludes: "But nothing herein contained shall abridge any of the powers possessed by the mayor of any city or town under any other provision of law or any ordinance."

It was contended in the court below by respondent, and is contended here, that the police commission bill is unconstitutional, in that it is in contravention of the following sections of the Constitution of the state, viz.: Section 6 of Article XVI, section 31 of Article V, and section 36 of Article V. Section 31 of Article V, above referred to, reads as follows: "Except as otherwise provided in this Constitution, no law shall extend the term of any public officer, or increase or diminish his salary or emolument after his election or appointment; provided, that this shall not be construed to forbid the legislative assembly from fixing the salaries or emoluments of those officers first elected or appointed under this Constitution, where such salaries or emoluments are not fixed by this Constitution." This section has no application to the case at bar. While the relator had acted as a patrolman prior to his appointment, under the new law his term of office, if we may use the expression at this point of the inquiry, was not extended. He was obliged to pass the examination, serve the probationary term, and receive a new

appointment before acting as patrolman under the provisions of the police commission bill. The only advantage the former patrolmen had was that the limitation as to age did not apply to them.

Section 36 of Article V of the Constitution reads as follows: "The legislative assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes, or to perform any municipal functions whatever."

In its decision entitled *"In re Senate Bill Providing for a Board of Public Works in the City of Denver,"* 12 Colo. 188, 21 Pac. 481, the supreme court of Colorado, after quoting a constitutional provision relating to "special commissions," similar to our section 36 of Article V, said: "It is obvious at a glance that, if this clause controls the legislative discretion in the premises, it is because the board of public works, as constituted by the Act under consideration, is a 'special commission,' within the meaning of that phrase as it was understood by the framers of the Constitution. This we do not think, for the following, among other, reasons: The board in question is made a department or branch of the city government. Its power to invest money in public improvements is for the present confined to the expenditure of $3,000,000, but its authority is not limited to this expenditure, and upon making the same its existence does not terminate. It is, like the board of health, fire, and other departments, permanent in its nature, being charged with certain continuous duties and vested with certain perpetual powers. These duties and powers are extensive, and in some respects unusual, but they relate exclusively to municipal affairs, and are essentially functions of the municipal government. The board has no separate existence, office or authority. It is an administrative agency or instrument, employed exclusively in the control and management of the city's improvements and other interests. In no material respect, save as to the scope and extent of its duties and powers, does it essentially

differ from the other departments by means of which the public interests are promoted, and the public health, peace and welfare protected within the municipality; nor is it an unusual agency, though in some respects its powers are extraordinary." Mr. Justice Elliott in a concurring opinion said: "In my opinion the term 'special commission,' as used in the constitutional provision under consideration, refers to some body or association of individuals separate and distinct from the city government; that is, created for different purposes, or else created for some individual or limited object not connected with the general administration of municipal affairs. It cannot be that the phrase 'special commission,' as here used, refers merely to a separate department of the city government as provided by the charter. To so conclude would be to hold that the board of supervisors, the board of aldermen, the health department, or the police department is a special commission; and hence that the General Assembly could not delegate to either of said boards or departments any power to make improvements, expend money, or perform any municipal function whatever." The bill under consideration by the Colorado court provided for a board of public works, the members of which should be appointed by the governor.

In the case of *Arnett* v. *State ex rel. Donohue,* 168 Ind. 180, 80 N. E. 153, 8 L. R. A., n. s., 1192, the supreme court of Indiana said: "The essential elements of what is known as the 'metropolitan police system' in the government of municipalities have been so often vindicated as against constitutional objection that the question should now be considered at rest."

The bill we have under consideration is not open to many of the objections considered by the Colorado court. In the first place, no extraordinary powers are conferred upon the members of the examining and trial board. Their duties consist merely in designating certain applicants as having the necessary qualifications to act as policemen and in trying charges against members. It is expressly provided that the mayor shall have charge of, and supervision over, the police department, and shall ap-

point all the members and officers thereof, including the members of the examining and trial board. No department is added to the city government and none is cut off therefrom. No powers are taken away from any department, nor are the powers or functions of any department interfered with or in any way curtailed. The Act is not violative of section 36, Article V, of the Constitution.

Section 6 of Article XVI provides: "The legislative assembly may provide for the election or appointment of such other county, township, precinct and municipal officers as public convenience may require and their terms of office shall be as prescribed by law, not in any case to exceed two years, except as in this Constitution otherwise provided." Respondent contends that a policeman is a municipal officer, and that, inasmuch as section 3 of the police commission bill declares that he shall hold office during good behavior, the whole bill is void. The position of the relator's counsel is found in these suggestions: (a) That a policeman is a state officer and not a municipal officer; (b) that, if he is not a state officer, he is simply a municipal employee, as distinguished from a municipal officer; and (c) that, if he is a municipal officer, the bill is not entirely void, but only that portion thereof fixing the duration of the term is unconstitutional, and the balance is good. We shall take these matters up in the foregoing order.

Is a policeman a state officer? The case of *Burch* v. *Hardwicke*, 30 Gratt. 24, 32 Am. Rep. 640, decided by the supreme court of Virginia in 1878, is confidently relied upon by the relator. In that case the mayor had removed the chief of police from office. The Constitution provided that "the mayor shall see that the duties of the various city officers are faithfully performed. He shall have power to investigate their acts, have access to all books and documents in their offices and may examine them and their subordinates on oath. He shall have power to suspend and remove such officers, whether they be elected or appointed," etc. The charter of the city of Lynchburg provided for a police department to be under the control

and management of police commissioners, consisting of the mayor, the president of the city council, and the judge of the corporation court. It was the duty of these commissioners to appoint a chief of police, whose term of office was fixed at two years. The plaintiff Hardwicke was appointed by the commission. The court, after referring to the supposed hardship and confusion that would result from overturning the "police commission" law, inasmuch as several large cities were being well policed by virtue of it, held that the "city officer" referred to in the Constitution was an officer like a superintendent of streets or of sewers, and not such an officer as a city treasurer. In reference to such officers as treasurer and others, the court said: "All these are generally mentioned as city officers, and they are even so designated in the Constitution, but no one has ever contended that either of them is in any manner subject to the control and removal of the mayor." We cannot follow the learned court in its determination that an officer like a city treasurer, expressly designated in the Constitution as a "city officer," is not a city officer. We shall refer to this subject again when we come to consider our own statutes. The Virginia court then goes on to hold that a chief of police and his subordinates are state officers, basing its conclusion seemingly on the proposition that many thousands of strangers enter a great city in the course of a year "in pursuit of business or pleasure," and that these must look to the police for protection. Neither can we follow the court to this last conclusion, to-wit, that patrolmen are technically state officers.

The supreme judicial court of Massachusetts, in the case of *Buttrick* v. *City of Lowell*, 1 Allen, 172, 79 Am. Dec. 721, said: "Police officers can in no sense be regarded as agents or servants of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the Legislature as a convenient mode of exercising a function of government; but this does not render them liable for their unlawful and negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar

powers and duties with which police officers and constables are intrusted are derived from the law, and not from the city or town under which they hold their appointment."

In the case of *Everill* v. *Swan*, 17 Utah, 514, 55 Pac. 68, the supreme court of Utah said: "Police officers are not mere servants of the municipal corporation. They are appointed under the laws of the state, by a board created for that purpose, to perform public service. While the jurisdiction of such officers is limited by certain boundaries, their service is not alone of local or corporate interest, but is important to the state at large as well, for the state has an interest in the peace and good order of each of its component parts. The duties which have been imposed upon them by the laws of the state they are bound to perform, independently of the corporation, such duties being of a public nature. The fact that the appointment of such officers was devolved upon the city or upon a board by the legislature does not deprive them of the character of public servants. Their appointment was so lodged simply as a convenient way to exercise a function of government. They are not therefore to be regarded as the mere agents or servants of the municipality, but as public or state officers."

In so far as these cases declare that policemen are state officers, without in any manner limiting or explaining the expression, we do not agree with them. Policemen are certainly not state officers in the same sense that the attorney general or the state treasurer are state officers. The lay mind would rebel at such a conclusion, and no refinement of reasoning could make it logical. We think the courts whose decisions we have just referred to were unfortunate in the use of the term "state officer," and that they intended simply to hold that a policeman is a public officer, in the sense that he has certain public duties to perform other than those strictly pertaining to the government of the municipality. With this latter determination we agree. If a policeman is strictly a state officer, the only way in which he could be removed would be by impeachment in accordance with the provisions of section 17 of Article

V of the Constitution, and Chapter 1 of Title III of the Penal Code.

The Constitution provides (Article VII, sec. 1) that the executive department of the state shall consist of the governor, lieutenant-governor, secretary of state, attorney general, state treasurer, state auditor, and superintendent of public instruction, each of whom shall hold his office for four years or until his successor is elected and qualified. Provision is also made (section 8) for the appointment by the governor of a state examiner, and also (section 7) for the nomination, and, by and with the consent of the senate, appointment, of all officers whose offices are established by the Constitution or which may be created by law, and whose appointment or election is not otherwise provided for. Except as provided in the foregoing sections, and as hereafter noted, we find in the Constitution no limitation upon the duration of the term of office of a state officer, and our attention has been called to none. The term of office of a justice of this court is six years (section 7, Article VIII, Constitution); of the clerk six years (section 9); of a district judge four years (section 12); of the clerk of the district court four years (section 18); of a county attorney two years (section 19); of a justice of the peace two years (section 20); of a county commissioner six years (section 4, Article XVI); of a county clerk, sheriff, treasurer, superintendent of schools, surveyor, assessor, coroner, and public administrator, two years (section 5); and of the commissioner of agriculture, labor, and industry, four years (section 1, Article XVIII). State senators are elected for four years, and representatives for two years (section 2, Article V). The foregoing, we think, includes all of the officers, state, county, and township, whose terms are fixed by the Constitution. Although six years is the longest term of office mentioned in the Constitution, we find no express declaration that a longer term may not be fixed by the legislature. The terms of the members of the first state board of education were fixed at two, three, four, and five years, respectively, and those of the railroad commissioners at

six years. We assume, then, that there is no limit, unless it be that the whole scheme of our system of government is in fundamental antagonism to life tenure of any sort of office, regardless of the duties attached thereto.

Policemen in this state all hold their places under city or town governments. We find no mention of the office in the Constitution. We have no state police as such. Respondent contends that a policeman is strictly a municipal officer, within the meaning of section 6, Article XVI, of the Constitution, *supra;* or, at any rate, that the office of policeman falls within the provisions of that section. There can be no doubt that a policeman is an "officer" not only within the ordinary meaning of the term in the street, but strictly and technically speaking also. Being attached to the municipality, it is within common knowledge that he has certain local duties to perform under the ordinances of all cities. A reference to any book of city ordinances will disclose the nature of such duties. But, in addition to these purely local duties, he has others, and these others are of a public and general nature pertaining to the observance and enforcement of the general laws of the state, principally the penal and criminal laws. We note a few instances: (a) A peace officer is a sheriff of a county, or his deputy, or a constable, marshal, or policeman of a township, city, or town. (Revised Codes, sec. 8924.) (b) Public offenses may be prevented by the intervention of the officers of justice: " * * * (2) By forming a police in cities and towns and by requiring their attendance in exposed places." (Revised Codes, sec. 8939.) (c) It is the duty of every police officer to prosecute persons who are offenders against the law. (Revised Codes, sec. 8426.) (d) Every police officer who shall refuse or neglect to perform any of the duties imposed upon him by the provisions of the chapter of the Penal Code, entitled "Gaming," is guilty of a misdemeanor. (Revised Codes, sec. 8428.) (e) It is the duty of all peace officers to prosecute or cause to be prosecuted all persons guilty of any violation of the so-called "wineroom law." (Revised Codes, sec. 8390.) (f) A warrant issued by a justice of the

supreme court or judge of a district court may be directed to any policeman in the state, and may be executed by such policeman in any part of the state. (Revised Codes, sec. 9040.) (g) Section 9041 of the Revised Codes provides that a warrant issued by any other magistrate may be directed to any policeman in the county, and may be executed by such officer in any part of the state. (h) Section 6362 of the Revised Codes provides that policemen may summon juries of inquest. (i) Section 3259, Revised Codes, provides that the council has power "to make regulations authorizing the police of a city or town to make arrests of persons charged with crime within the limits of the city or town, and within five miles thereof, and along the line of the water supply of the city or town." Many other provisions might be cited showing that policemen in this state are charged with general duties under the state laws in addition to their local duties. What, then, is the result? It appears that a policeman occupies a sort of dual position. He is, strictly speaking, neither a state officer, as such, nor an officer acting in a purely local capacity. He may be said to be *sui generis*, occupying a unique place of his own, and so we are inclined to regard him.

We are not permitted to declare this law unconstitutional if we can reconcile the conflicting statutes and decisions, and thus avoid such determination. "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt." (*Ogden* v. *Saunders*, 12 Wheat. 213, 6 L. Ed. 606; *Anderson* v. *Ritterbusch* (Okl.), 98 Pac. 1002.) Perhaps it is not out of place to notice at this time the argument of the appellant that policemen are mere employees or servants of the city. We cannot agree with this contention. To so hold would strip them as officers of all protection under the laws, and a result so grave should be avoided, if possible. Section 8180 of the Revised Codes provides that any person who attempts by means of any threat or violence to deter or

prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer in the performance of his duty, is punishable by fine and imprisonment. Can it be doubted that one who resisted a policeman in the execution of a warrant issued by a justice of this court or a district judge, would be guilty of resisting an officer?

But it is said that because the legislature in 1899 passed the law creating fire departments in cities and towns (see Laws 1899, page 73), and provided therein that firemen should hold their places during good behavior, and should not be deemed officers of the municipal corporation, and thereafter, in 1907, prescribed the same tenure of office for policemen, it must be presumed to have intended to declare that policemen should not be deemed officers of the municipality. There are two answers to this suggestion: (1) That the duties of firemen are purely local; and (2) that the legislature, having once had its attention called to the matter of the legal *status* of such persons, could have declared that policemen were not municipal officers, had it so desired, assuming, in passing, that it had the power to do so without taking away their public functions. It seems to us that the fact that the legislature failed to declare that policemen should not be deemed officers of the municipal corporation is significant of the intention of that body to regard them as officers of some sort. We think policemen are not mere servants or employees of a city.

To recur, then, to the meaning of the words "municipal officers," found in section 6 of Article XVI of the Constitution. Section 3216 of the Revised Codes reads as follows: "The officers of a city of the first class consist of one mayor, two aldermen from each ward, one police judge, one city treasurer, who may be *ex officio* tax collector, who must be elected by the qualified electors of the city as hereinafter provided. There may also be appointed by the mayor, with the advice and consent of the council, one city attorney, one city clerk, one chief of police, one assessor, one street commissioner, one city jailer, one city sur-

veyor, and whenever a paid fire department is established in such city, a chief engineer and one or more assistant engineers, and any other officers necessary to carry out the provisions of this title. The city council may by ordinance prescribe the duties of all city officers and fix their compensation, subject to the limitations contained in this title." We find here the elective officers specifically mentioned and designated as the "officers of a city." This is an express declaration that they are city officers. It is then provided that there may also be appointed by the mayor, with the advice and consent of the council, one city attorney, one city clerk, one chief of police, one assessor, one street commissioner, one city jailer, one city surveyor, one chief engineer, and one or more assistant engineers of the fire department. "and any other officers necessary to carry out the provisions of this title." What is the *status* of a policeman? Respondent contends that the phrase "any other officer" applies to him. Our answer to this contention might be that the moment such "other officer" is appointed, if he be appointed a policeman, he falls within that class having state as well as local duties to perform, and therefore is not and cannot be a strictly municipal officer within the meaning of section 6 of Article XVI, *supra*.

The term "municipal officers" used in the Constitution means "city officers." The word "municipal" has its origin in the idea of a free town or city, and in its popular use is applied to cities, although in its general meaning it embodies the idea of local self-government, as distinguished from centralized government. " 'Municipal' may either refer to a town or a city." (*Sessions* v. *State*, 115 Ga. 18, 41 S. E. 259. See, also, 5 Words and Phrases Judicially Defined, p. 4618.) In the case of *Lebcher* v. *Commissioners of Custer County*, 9 Mont. 315, 23 Pac. 713, this court, speaking through the late Mr. Justice De Witt, treated a county as a municipal corporation. Section 3806 of the Revised Codes provides that public corporations are formed or organized for the government of a portion of the state. But section 6 of Article XVI of the Constitution expressly mentions "county" as well as "municipal" officers, so

that the word "municipal," as therein employed, is used in its restricted sense, meaning "city."

The only officers of a city of the first class actually *created* by the legislature are the mayor, two aldermen from each ward, a police judge, and a city treasurer. This is apparent from section 3220, Revised Codes, which provides that the city council has power to abolish any office the appointment to which is made by the mayor with the advice and consent of the council, and discharge any officer so appointed, "but no office created by this title must be abolished by the council." The city council may by ordinance consolidate any of the officers the appointment to which is made by the mayor with the advice and consent of the council, and may require any of the elected officers to perform any of the duties of an appointed officer whose office has been abolished. It will be seen from the foregoing that all of the offices which are to be filled by the mayor with the advice and consent of the council may be abolished, and the duties appertaining thereto added to those of the elective officers. But the elected officers stand in a class by themselves, and cannot be in any way affected by any action of the council.

But assuming, without deciding, that all of the officers, elective and appointive, mentioned in section 3216, are city officers, let us consider what those officers are. They are (1) the mayor, aldermen, police judge and city treasurer; and (2) such other officers as are appointed by the mayor, *with the advice and consent of the council.* An examination of the police commission bill discloses that policemen are to be appointed by the mayor from the eligible list without consulting the council; so that a policeman falls within neither class. We have not overlooked section 3258, Revised Codes, which reads as follows: "The duties and compensation of the street commissioners, chief of the fire department, city surveyor and other city officers not provided in this title may be prescribed by ordinance." But this somewhat loose expression does not alter our opinion as to the meaning of section 6, Article XVI of the Constitution, and section 3216, Revised Codes, as applied to policemen, in view

of the fact that street commissioners, chief engineer of the fire department, and city surveyor are all mentioned in section 3216, and their appointment must be confirmed by the council. The incumbents of offices not actually created by the legislature, but left to the judgment of the mayor and council to bring into existence may or may not be "city officers," within the meaning of the Constitution. This point, as hereinbefore stated, we do not decide. But it seems clear that, if any such appointee is a "city officer" within the meaning of the Constitution, he is such a one only as may be appointed with the advice and consent of the council; and his place may be abolished and his duties added to those of an elective officer, leaving the city government intact, with its full quota of officers. It is true that some of the incumbents of these places are popularly regarded as city officers, as, for instance, the chief of police and the city clerk, and they are in fact officers in the sense that they have official duties to perform in distinction to their private obligations, and are attached to the city government. However, as policemen belong to neither of the classes, the two-year period of limitation does not apply to their terms.

Another contention of the respondent is that section 14 of the police commission bill reserves to the mayor the right given him under subdivision 2, of section 4781, Political Code, to suspend, and, with the consent of the council, to remove, the relator from his place as policeman. Section 14 reads as follows: "All Acts and parts of Acts inconsistent with the provisions of this Act are hereby repealed, but nothing herein contained shall abridge any of the powers possessed by the mayor of any city or town under any other provision of law or any ordinance." To quote from the brief of respondent's counsel: "The very essence of this entire police bill, its design, its extent, and its purpose was to afford a tenure for life." And from the relator's brief we quote this: "The purpose of the bill was to put members of the police force under civil service rules, and insure them, when once finally appointed, a continuance in their positions during good behavior or until by age or disease they become permanently incapacitated to discharge

their duties or until removed for good cause after trial." We agree with relator's counsel that to give section 14 the interpretation contended for by the respondent would render the police commission bill in great part self-destructive. We are of opinion that section 14 took from the mayor the right to suspend or remove a policeman save as provided in the police commission bill itself.

It is said that the affidavit fails to allege that the council had not by ordinance abolished the office, but the allegation of the affidavit is that the relator was discharged by the respondent as mayor. This disposes of all questions properly presented for consideration.

The judgment of the district court of Lewis and Clark county is reversed, and the cause is remanded, with directions to overrule the demurrer to the affidavit or so-called complaint, and to vacate the order quashing the alternative writ of mandate and proceed in accordance with the views herein expressed.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied March 20, 1909.

PLAINS LAND & IMPROVEMENT CO. ET AL., APPELLANTS, v. LYNCH ET AL., RESPONDENTS.

(No. 2,551.)

(Submitted December 15, 1908. Decided February 8, 1909.)

[99 Pac. 847.]

Probate Proceedings—Estates of Deceased Persons—Sale of Real Property—Petition for Order to Sell—Contents—Defects—Jurisdiction—Collateral Attack.

Estates of Decedents—Real Property—Sale—Petition—Statutes—Substantial Compliance.

1. A petition for the sale of real estate of a decedent, which complies substantially with the provisions of section 7562, Revised Codes, prescribing what such paper shall contain, is sufficient.

Same—Petition for Sale—Contents—Jurisdiction.

2. *Held*, that the requirement of section 7562, Revised Codes, that the *condition* and *value* of the real estate of a deceased person shall be set forth in a petition to sell such real property to pay debts, is not jurisdictional; and that, upon a collateral attack, defects in the petition with reference to such matters will not operate to set aside the proceedings had on the petition for leave to sell, after the sale has been made and the purchaser has, in good faith, paid the purchase price and gone into possession of the land sold.

Same—Defective Petition—Sale—Collateral Attack.

3. A petition to sell real estate of a decedent, which in its statement as to the *condition* thereof was so defective as to amount to an entire omission in this regard, and which as to its value set forth that it had been "appraised at the sum of $2,000" (which appraisement was had less than one year prior to the presentation of the petition), was not so defective as to render the sale void on a collateral attack, in an action to quiet title brought by heirs of the estate.

Same—Minute Entry—Evidence—Signature of Judge—Surplusage.

4. An entry in the minute-book required to be kept by section 7701, Revised Codes, for probate proceedings, of an order to show cause why real estate of a deceased person should not be sold, as asked by a petition filed for that purpose, was sufficient evidence of the fact that the order was duly made, and the act of the clerk in signing the judge's name to the entry did not render it incompetent as evidence. The signature was surplusage.

Same—Order of Sale—Omission of Terms—Cured by Confirmation.

5. Where real estate of a deceased person was sold, on the petition of the administratrix, for cash and for considerable more than its appraised value, and the court after a full hearing confirmed the sale, the failure of the order of sale to state the terms thereof was cured by such confirmation.

Same—Order of Sale—Clerical Error—Effect.

6. The petition for an order of sale of the real estate of a decedent, consisting of one parcel of land, the notices of sale, the order of confirmation and the deed correctly described the land to be sold as being situated in range "26," etc. In the order of sale (which referred to the petition), however, it was described as located in range "25." The land was sold, the deed delivered, the purchase price paid, and the purchaser platted the land for city additions and had sold portions thereof to others, when certain of the heirs of the estate brought suit to quiet title, claiming, *inter alia*, that by reason of the misdescription of the land in the order, the sale was void. *Held*, that taking into consideration all the records in the proceedings leading up to the sale, the substitution of the figures "25" for "26" in the order of sale was a clerical error, and that under the circumstances disclosed the sale should not, on collateral attack, be declared void for such error.

Same—Irregularities—Errors Within Jurisdiction—Review.

7. Where the district court had jurisdiction to make an order of sale of a decedent's real estate, and the order itself was not void, any defects in the proceedings leading up to the sale were errors within jurisdiction, subject to review on appeal in the probate proceedings only, and not open to collateral attack by heirs seeking to set aside the sale for errors which amounted only to irregularities in the proceedings, and which, under section 7625, Revised Codes, must be disregarded.

(MR. CHIEF JUSTICE BRANTLY dissenting.)

Appeal from District Court, Missoula County; Geo. B. Winston, Judge, presiding.

ACTION by the Plains Land and Improvement Company and others against Charles A. Lynch and others. Judgment for defendants, and plaintiffs appeal from it and an order denying them a new trial. Reversed and remanded.

Messrs. Woody & Woody, Messrs. Marshall & Stiff, Mr. H. J. Burleigh, Mr. Albert J. Galen, and ***Mr. W. H. Poorman,*** for Appellants.

The recitals in a petition for the sale of real estate of a deceased person need only show a substantial compliance with the requirements of section 7562, Revised Codes. The petition in this case was at least an attempt to comply, which could only be taken advantage of at the time fixed in the order to show cause. (*Stuart* v. *Allen,* 16 Cal. 474, 76 Am. Dec. 551; *Wilson* v. *Hastings,* 66 Cal. 243, 5 Pac. 217; *Estate of Heydenfeldt,* 127 Cal. 458, 59 Pac. 839; *In re Boland's Estate,* 55 Cal. 310; *Burris* v. *Adams,* 96 Cal. 664, 31 Pac. 565; *Richardson* v. *Butler,* 82 Cal. 174, 23 Pac. 9; *Estate of Arguello,* 85 Cal. 154, 24 Pac. 641.)

If there were any defects in the petition for the order of sale, such defects, if any, were cured by the recitals in the order of sale. (*Ackerson* v. *Orchard,* 7 Wash. 377, 34 Pac. 1107, 35 Pac. 605.)

Here we have an order made by a court of competent jurisdiction and appearing upon the records of said court as an official act, performed by a public officer. The law will presume official acts of public officers to have been rightfully done, and acts done which presuppose the existence of other acts to make them legally operative are presumptive proof of the latter. (*Bank of United States* v. *Dandridge,* 12 Wheat. 70, 6 L. Ed. 552; *McNitt* v. *Turner,* 16 Wall. (U. S.) 363, 21 L. Ed. 341; *Coombs* v. *Lane,* 4 Ohio St. 112; *Ward* v. *Barrows,* 2 Ohio St. 241; *Tecumseh Townsite Case,* 3 Neb. 267; *Seward* v.

Dider, 16 Neb. 58, 20 N. W. 12; *Cornett* v. *Williams*, 20 Wall. (U. S.) 250, 22 L. Ed. 254; *Johnson* v. *Beazley*, 65 Mo. 250, 27 Am. Rep. 276.) "When an act is to be done which can be done legally only after the performance of some prior act, proof of the latter carries with it a presumption of the due performance of the prior act." (*Knox County* v. *Ninth National Bank*, 147 U. S. 96, 13 Sup. Ct. 267, 37 L. Ed. 93; *Nofire* v. *United States*, 164 U. S. 657, 17 Sup. Ct. 212, 41 L. Ed. 588; *Huey* v. *Van Wie*, 23 Wis. 613; *Delaney* v. *Schuette*, 49 Wis. 366, 5 N. W. 796.)

Public policy requires that all reasonable presumptions should be made in support of judicial sales, especially respecting matters *in pais*. (*Wyman* v. *Campbell*, 6 Port. (Ala.) 219, 31 Am. Dec. 677; *Massenberg* v. *Denison*, 71 Fed. 618, 18 C. C. A. 280; *Gray* v. *Gardiner*, 3 Mass. 401.)

"An order or decree confirming a judicial sale is a final and conclusive judgment determining the rights of the parties, possessing the same force and effect as any other adjudication by a court of competent jurisdiction." (*Allison* v. *Allison*, 88 Va. 328, 13 S. E. 549; *Kincaid* v. *Tutt*, 88 Ky. 392, 11 S. W. 297; *State National Bank* v. *Neel*, 53 Ark. 110, 22 Am. St. Rep. 185, 13 S. W. 700; *Thomas* v. *Davidson*, 76 Va. 338; *Brown* v. *Gilmore*, 8 Md. 322; *Dawson* v. *Litsey*, 10 Bush, 48; see, also, *Berlin* v. *Melhorn*, 75 Va. 639; *Thomas* v. *Davidson*, 76 Va. 338; *Karn* v. *Rorer Iron Co.*, 86 Va. 754, 11 S. E. 431; *Brown* v. *Gilmore*, 8 Md. 322; *Allison* v. *Allison*, 88 Va. 328, 13 S. E. 549.)

Jurisdiction having attached in a case, everything done within the power of that jurisdiction, when collaterally questioned, is held to be conclusive of the rights of the parties unless impeached for fraud. (*Manson* v. *Duncanson*, 166 U. S. 547, 17 Sup. Ct. 647, 41 L. Ed. 1105; *Thompson* v. *Tolmie*, 2 Pet. 168, 78 L. Ed. 381; *Cooper* v. *Reynolds*, 10 Wall. 308, 19 L. Ed. 931.)

Defendant Mary Boyer is estopped by her acts from denying the validity of the sale of said land made by her as administratrix, and is also estopped from asserting any right, or

claiming any interest or estate in the land in controversy. (*Hostler* v. *Hays*, 3 Cal. 303; *Carpy* v. *Dowdell*, 115 Cal. 677, 47 Pac. 695; *Caldwell* v. *Auger et al.*, 4 Minn. 217, 77 Am. Dec. 515; *Coleman* v. *Pearce*, 26 Minn. 126, 1 N. W. 846; *Crawford* v. *Nolan*, 70 Iowa, 97, 30 N. W. 32; *Linman* v. *Riggins*, 40 La. Ann. 761, 8 Am. St. Rep. 549, 5 South. 49, 18 Cyc. 339, note 65; *Davis* v. *Ford*, 15 Wash. 107, 45 Pac. 739, 46 Pac. 393.)

A guardian cannot attack the validity of a sale that he has made. (*Williamson* v. *Woodman*, 73 Me. 163; *State* v. *Weaver*, 92 Mo. 673, 4 S. W. 697; *Dodge* v. *St. John*, 96 N. Y. 260.) As between guardians' and administrators' acts, the principle is the same, and the law applicable to guardians will apply with equal force to administrators.

Mr. T. J. Walsh, Mr. W. N. Noffsinger, Mr. H. D. Folsom, Jr., and *Mr. H. C. Schultz*, for Respondents.

This is not a case of substantial compliance with the requirements of the statute, as contended by appellants, but one of defects and omissions amounting to a failure to show jurisdictional facts, and herein is where the cases cited by appellants differ materially from the case at bar. A particularly able discussion of the matters necessary to be stated in the petition is to be found in the case of *Haynes* v. *Meeks*, 20 Cal. 288, at 312. Proceedings for the sale of real estate in the probate court are in the nature of an action, and "the jurisdiction of the probate court depends absolutely on the sufficiency of the petition; in other words, on its substantial compliance with the requirements of the probate law." (*Estate of Boland*, 55 Cal. 310-315.) The omission of any fact required by statute to be stated in the petition makes the sale void. (*Pryor* v. *Downey*, 50 Cal. 388, 19 Am. Rep. 656; *Davidson* v. *Wampler et al.*, 29 Mont. 61, 74 Pac. 82; *Jones* v. *Falvella*, 126 Cal. 24, 58 Pac 311; *Stilwell* v. *Swarthout*, 81 N. Y. 109; *In re Slater's Estate*, 17 Misc. Rep. 474, 41 N. Y. Supp. 534.) Unless the petition states the facts required by the statute, the court does not acquire jurisdiction of the matter, and has no power to confirm the sale or to impart validity to it. (*Gregory* v. *Taber*, 19 Cal.

397, 79 Am. Dec. 219.) It is a fatal defect in the petition that it does not contain a statement of the condition or value of the real estate to be sold. This is a jurisdictional fact. Its omission renders the sale void. (*Estate of Boland, supra; In re Smith,* 51 Cal. 563; *Kertchem* v. *George,* 78 Cal. 597, 21 Pac. 372; *Fitch* v. *Miller,* 20 Cal. 352; *In re Devincenzi's Estate,* 119 Cal. 498, 51 Pac. 845; *Townsend* v. *Gordon,* 19 Cal. 189; *Gregory* v. *Taber,* 19 Cal. 410, 79 Am. Dec. 219; *Gregory* v. *McPherson,* 13 Cal. 575; *Pryor* v. *Downey,* 50 Cal. 388, 19 Am. Rep. 656.) The foregoing citations apply with equal force to the defendants' objections that the petition does not set forth the debts, expenses and charges of administration already accrued.

Absence of any order to show cause is fatal to the validity of the sale. (*Townsend* v. *Tallant,* 33 Cal. 51, 91 Am. Dec. 617; *Campbell* v. *Drais,* 125 Cal. 253, 57 Pac. 995; *Burris* v. *Kennedy,* 108 Cal. 331, 41 Pac. 460.) An administrator's sale, ordered and confirmed without proper notice to the heir, is void and collaterally assailable. (*Gibbs* v. *Shaw,* 17 Wis. 197, 84 Am. Dec. 737; *Morris* v. *Hogle,* 37 Ill. 150, 87 Am. Dec. 243; *Schnell* v. *Chicago,* 38 Ill. 382, 87 Am. Dec. 304.) Where the only notice or citation found among the records is insufficient, it is evidence to show that no legal notice or citation has ever been issued or served. (*Dogan* v. *Brown,* 44 Miss. 235.) Here the record is not entirely silent, and, therefore, the jurisdictional facts are not presumed to have existed. (*Withers* v. *Patterson,* 27 Tex. 491, 86 Am. Dec. 643; *Settlemier* v. *Sullivan,* 97 U. S. 444, 24 L. Ed. 1110.)

The order of sale in this matter was void. Orders and judgments which the court has not the power to make or render are null and void, and being null, their nullity may be asserted in any collateral proceeding where they are relied on in support of a claim of right. (Cases cited *supra.* Also, *Withers* v. *Patterson,* 27 Tex. 491, 86 Am. Dec. 643; *Trammel* v. *Philleo,* 33 Tex. 395; *Ferguson* v. *Crawford,* 70 N. Y. 253, 26 Am. Rep. 589; *Hood* v. *Hood,* 85 N. Y. 578.) An order of confirmation

cannot validate the sale. (17 Am. & Eng. Ency. of Law, 993, and notes 1, 2, p. 994.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action to quiet title. The plaintiffs claim under a deed from the administratrix *de bonis non* of the estate of Neptune Lynch, Sr. The defendants are three of the four heirs at law of Neptune Lynch, Sr., and claim an estate in the property in controversy by inheritance. The trial court found the issues in favor of the defendants, and a decree was rendered and entered quieting their title to an undivided three-fourths interest in the land in controversy, subject, however, to a lien in favor of the plaintiffs for $1,854.80, that being three-fourths of the amount paid for the property at the sale by the administratrix. From the judgment and order denying them a new trial the plaintiffs appeal. Counsel for respondents in their brief point out a number of defects in the probate proceedings leading up to the sale, which they insist render the sale void.

1. The first of these alleged defects relates to the petition to sell real estate. Section 7562 of the Revised Codes provides that a petition for the sale of real estate shall set forth (1) the amount of personal property that has come into the hands of the administrator; (2) how much thereof, if any, remains undisposed of; (3) the debts outstanding against the decedent, as far as can be ascertained or estimated; (4) the amount due upon the family allowance, or that will be due after the same has been in force one year; (5) the debts, expenses and charges of administration already accrued; (6) an estimate of what will or may accrue during the administration; (7) a general description of all the real property of which the decedent died seised, or in which he had any interest, or in which the estate has acquired any interest; (8) the condition and (9) the value thereof; (10) the names of the legatees and devisees, if any; and (11) the names of the heirs of the deceased, so far as known to the petitioner.

The petition in this instance omits any reference, in terms, to the matters required in subdivisions 2, 4, or 10; attempts to state the requirements of subdivision 5 by giving the amount of debts, expenses, and charges of administration accrued and *remaining unpaid;* recites, with reference to the requirements mentioned in subdivisions 7, 8 and 9, that "the following is a full description of all the real estate of which the decedent died seised, or in which he had any interest, or in which said estate has acquired any interest: Lot Number One (1), and the NE. ¼ of SE. ¼ of Section Number Twenty-seven (27), Township Twenty (20) North, Range Twenty-six (26) West, less right of way of Northern Pacific Railway Company, and parcel set apart for school ground, and appraised at the sum of $2,000.00"; and in other respects the petition appears to have complied literally with the section above. The petition itemizes the personal property which had come into the hands of the administratrix, and prays for an order to sell all of it, so that it may be said to appear that all of the personal property that had come into her hands remained undisposed of. The petition also sets forth that Neptune Lynch, Sr., died intestate, and this may be treated as a sufficient statement that there are not any legatees or devisees. It does not appear from the petition what, if anything, is due upon family allowance, if any ever had been made. But, since the purpose of requiring these various items of debts, charges and expenses to be stated is to inform the court of the financial condition of the estate, and whether or not in any event a sale of property is necessary, and since a family allowance is in fact a charge against the estate, and since the petition in this instance assumes to state the full amount of all of such charges, one of two conclusions seems inevitable: Either that there was not any family allowance made, or, if made, it is included in the total charges enumerated. However, this particular defect is not urged upon us by counsel for respondents in their brief, and we may treat the petition in this respect as complying substantially with the requirements of the statute.

The principal contention, however, arises over the alleged failure of the petition to state the condition and value of the real estate. All that is said in the petition on the subject is quoted above. But counsel for appellants contend that the language, "less right of way of Northern Pacific Railway Company and parcel set apart for school grounds, and appraised at $2,000," refers to the condition of the land, and is a sufficient reference to enable the court to proceed with a hearing on the petition. We content ourselves with saying that, if this was intended for the purpose, it is so indefinite and uncertain as to be of no practical use; and, since we must assume that the legislature had some purpose in mind in requiring this matter to be stated, that purpose would obviously be circumvented by allowing a statement of this character to meet the requirement. We prefer to treat the petition as omitting any statement as to the condition of the real property. But is this such a defect as to render the order of sale void and open to collateral attack?

As we understand counsel for respondents, they do not insist that every fact required to be stated by section 7562 is jurisdictional, for they do not insist upon a literal compliance with the statute, but concede that the rule of construction is that a substantial compliance with the requirements of the statute is all that is required. The object of the proceeding under this section is to obtain an order to sell, and, before such order can be made, the necessity for the sale must be made to appear; and while this section, in subdivision 11, requires the names of the heirs, so far as known, to be given, it is inconceivable that the name of a particular heir could be of the slightest possible assistance to the court or judge in determining whether the necessity for the sale exists. With the object of this proceeding before us, we imagine that it will be conceded by everyone that a petition which on its face shows the sale to be necessary will be sufficient when drawn in question by a collateral attack upon the order of sale. But what are the facts which show the sale to be necessary? In the early case of *Haynes* v. *Meeks*, 20 Cal. 288, Chief Justice Field, speaking for the court, said

in effect that the petition must show, first, the insufficiency of the personal property to pay the debts, and, second, the necessity for selling real estate, and that such necessity does not follow as of course from a mere insufficiency of personal property; that, if the real estate is yielding an income sufficient to pay the outstanding debts and charges, there would not be any necessity for a sale, and that the necessity must appear from the description of the land, its condition, and value. The opinion is further expressed that facts showing the description, condition and value of the land cannot be dispensed with from the petition any more than the statement of the debts or personal property. This case was decided in 1862. In January, 1877, the same court, in construing the same statute, said: "The court should be informed by the petition of the condition of the property; that is, whether the property is improved or unimproved, productive or unproductive, occupied or vacant, and the like. Such information is necessary to enable the court to intelligently exercise its judgment in the selection of the property of the estate which can be most advantageously sold." (*Smith's Estate,* 51 Cal. 563.) This was the last and controlling pronouncement by that court at the time we adopted the statute from California in February, 1877; and upon the theory that, in adopting the statute, we also adopted the construction placed upon it at the time by the highest court of the state from which we took the statute, we might content ourselves by saying that such construction must be deemed controlling, in the absence of any good reason for a contrary holding. It is only fair, however, to say that in 1880, after we had incorporated the statute in our laws, the supreme court of California, in *Boland's Estate,* 55 Cal. 310, reiterated the doctrine announced in *Haynes* v. *Meeks,* and also that in *Smith's Estate,* and, by way of giving emphasis to the views of the court, said, in effect, that the description, condition, and value of the real estate are jurisdictional facts which must appear from the petition. Again, in *Kertchem* v. *George,* 78 Cal. 597, 21 Pac. 372, the doctrine announced in *Smith's Estate* is repeated; but the court there holds

that, unless the condition of the real estate appears in the petition or in the order of sale, the sale is void for want of jurisdiction in the court to order it. Later, in *Devincenzi's Estate*, 119 Cal. 498, 51 Pac. 845, the same court held that an entire absence from the petition of any reference to the condition of the real estate would render the petition insufficient and the court would fail to obtain jurisdiction. At the same time it reiterates again the doctrine announced in *Smith's Estate*. In *Burris* v. *Kennedy*, 108 Cal. 331, 41 Pac. 458, the same court, speaking through Mr. Justice Temple, said: "I think there has been no time since 1858 when a sale of real estate would have been declared void because it omitted to give a *description* of all the real estate of which the deceased died seised or the *valuation* or *condition* of the different parcels. * * * Section 1537 expressly required the statement of some facts which have no bearing upon the question of the necessity of the sale. The description of the real estate or its value throw no light upon that matter. These and some other matters are required to be stated to enable the court to exercise its discretion more intelligently after it has determined the sale to be necessary. * * * The facts showing that a sale is necessary are that there are debts, that an allowance has been made for the support of the family, or that there are expenses of administration, and that there is not sufficient money in the hands of the administrator to pay them." And, finally, in *Levy's Estate*, 141 Cal. 639, 75 Pac. 317, decided in 1904, the same court again announced the rule in *Smith's Estate*, above.

From these cases it is apparent at once that while the supreme court of California has adhered strictly at all times since 1877 to the rule announced in *Smith's Estate*, it has not been at all consistent in applying the rule, and has apparently not given any attention to the conflicting doctrines announced in other respects. In our view of these cases they announce two irreconcilable theories as to the purpose of the statute. These theories are aptly illustrated in *Boland's Estate* and in *Burris* v. *Kennedy*. In the first it is held that the condition of the

real estate is a jurisdictional fact, and the statement of such condition of the very essence of the petition. In the latter it is held that the purpose of requiring the condition to be given is to enable the court to exercise its discretion more intelligently after it has determined the sale to be necessary, and that the statement of the condition does not involve any question of jurisdiction. The decision in *Boland's Estate* follows upon the reasoning of the court in *Haynes* v. *Meeks,* while *Burris* v. *Kennedy* is founded upon the rule announced in *Smith's Estate.* We have reviewed these cases at length because of the fact that some of them are relied upon confidently by counsel for appellants, while others are just as confidently relied upon by counsel for respondents. So that we find ourselves confronted by these two theories announced by the highest court in the state from which we took our statute, and the necessity of determining which, if either, we shall adopt in this state.

Very many of the matters arising in the due course of administration of an estate may properly be characterized as routine. Many of the proceedings are *ex parte,* but one of the most prominent purposes to be accomplished is the payment of the debts of the estate. This is the point at which the interests of the estate and of third persons—creditors—meet, and much more consideration is given to this than to any other subject connected with such administration. That the debts shall be paid is the injunction of the law. Sections 4799 and 7546, Revised Codes, provide:

"Sec. 4799. When a person dies intestate, all his property, real and personal, without any distinction between them, is chargeable with the payment of his debts, except as otherwise provided in this Code and the Code of Civil Procedure."

"Sec. 7546. All the property of the decedent shall be chargeable with the payment of the debts of the deceased, the expenses of the administration, and the allowance to the family, except as otherwise provided in this Code and in the Civil Code. And the said property, personal and real, may be sold, as the court or judge may direct, in the manner prescribed in this Chapter.

There shall be no priority as between personal and real property for the above purposes."

The exceptions in each of these sections refer to homesteads set apart and allowances made for the support of the family pending the appointment of an administrator, to estates in which the property is sought to be disposed of by will, and to estates of which summary disposition is made. But, barring these, the sections just quoted impress upon us the idea that all of the property of the estate is subject to the payment of the debts, using that term in its general sense, to include debts, family allowances, expenses, and charges of administration already accrued and to accrue.

Section 7561 provides: "When a sale of the property is necessary to pay the allowance of the family or the debts outstanding against the decedent, or the debts, expenses, or charges of administration, or legacies, the executor or administrator may also sell any real as well as personal property of the estate for that purpose upon the order of the court or judge; and an application for the sale of real property may also embrace the sale of personal property." Taken in connection with the sections quoted above, and sections 7611-7613, if this section means anything, it is this: That the existence of debts and the inadequacy of available funds to pay them give rise to the necessity to sell property. (*Burris* v. *Kennedy*, above.) And, if such necessity appears, the real as well as personal property may be sold upon an order for that purpose. When the various sections above are considered together and with section 7651, it would appear to be a matter of discretion in the court or judge whether the personal property or real estate be sold first; but whether this be so or not is of no consequence here. If, then, the debts of the estate appear to exceed in amount the available means at hand, it may fairly be said to appear that a sale is necessary; and, if real estate is to be sold, the court or judge may properly consult the recitals of the petition as to the condition of the real estate to determine whether all or only a por-

tion should be sold, and, if only a portion, then what particular portion.

In our opinion the requirement of section 7562, above, that the condition of the real estate be given in the petition, was not intended to confer jurisdiction upon the court, and that this petition states facts sufficient to authorize the court to proceed. We think the rule announced in *Smith's Estate,* above, not many years after the statute was adopted in California, correctly represents the purpose of the legislature in requiring the condition to be stated in the petition, and in adopting the statute we ought to give full force and effect to the rule of construction then placed upon it, and which seems in perfect harmony with our other statutory provisions. The result of the application of that rule leads to the conclusion announced in *Burris* v. *Kennedy,* above.

It is said that the value of the real estate sought to be sold is not stated in the petition; and, while there is room for argument as to the meaning of the statement contained in the petition, when tested by strict rules of grammatical construction, we think it may be said that it fairly appears that the petitioner meant that the property described and sought to be sold is appraised at $2,000. Since it appears from this record that the appraisement was had less than a year prior to the presentation of the petition to sell, it is a sufficient statement of the value. (*Silverman* v. *Gundelfinger,* 82 Cal. 548, 23 Pac. 12; *Levy's Estate,* above.) We do not mean to say that the statements of the condition and value of the real estate are inconsequential matters, but we do mean to say that they are not matters of jurisdiction. They are intended to give to the court a better idea of the property belonging to the estate before an order of sale is made; and, upon review on appeal in the probate proceeding itself, this court would be justified in applying the statute with some rigor, to the end that the errors might be corrected and the purposes of the statute fully carried out. But after the sale has been made and confirmed, and purchasers have parted with their money and have gone into possession of the property,

upon a collateral attack this court would not be justified in setting aside the proceedings and holding them for naught because of a defect of this character.

2. It is next contended that there was not any competent evidence that an order to show cause why the real estate should not be sold was ever made. In the minute-book kept for probate proceedings, as required by section 7701, there is an order to show cause entered at length. It is true that it purports to bear the signature of the district judge, but the signature is by the clerk of the court who entered the order. Since, however, the statute does not require that an order made in open court shall be signed by the judge, we may properly treat the signature as surplusage and the entry sufficient evidence of the fact that the order was duly made. There is not any requirement of law that the clerk shall recite that the order was made; but he is required to enter the order as made.

3. It is said that the order of sale is void because "(a) it fails to describe the terms and conditions of sale; (b) it fails to order a public sale or to adjudge that it would be for the benefit of the estate that the property be sold at private sale; (c) the lands described in the order are not the lands described in the petition or in the administrator's deed or in the order of confirmation."

(a) It is true that the order fails to state the terms of sale as required by section 7569; but that section limits the terms which may be made to cash or credit for not more than one year. The return shows that the property was sold for cash and for a considerable sum more than its appraised value. After a full hearing, the district court confirmed the sale, and thereby ratified the action of the administratrix in selling for cash. It is a general rule of law that the confirmation of the sale cures all irregularities in the proceedings leading up to the sale. (17 Am. & Eng. Ency. of Law, 993; 18 Cyc. 793.)

(b) The petition in this instance asked for authority to sell at public or private sale, and the statute (section 7569) specifi-

cally authorized the court to make the order in the alternative, as was done in this instance.

(c) The most serious question arises over the description of the property in the order of sale. The land belonging to the estate was situated in range 26 west, and the petition for the sale, the notices of sale, the order of confirmation, and the deed correctly describe it. But in the order of sale and in the return it is described as in range 25 west. The order of sale was the warrant of authority by which the administratrix acted, and without it she could not have proceeded. (*Broadwater* v. *Richards,* 4 Mont. 80, 2 Pac. 546.) But, after all, it is but a determination that the sale is necessary and an authority to make the sale. It does not affect the title or grant any right. It is the order of confirmation which finally operates to divest the heirs of their title and to secure to the purchaser the property. (12 Cyc. 787; 11 Am. & Eng. Ency. of Law, 1114.) Section 7578, Revised Codes, provides that, when the order of confirmation is made, "the sale from *that time* is confirmed and valid."

In *Davie* v. *McDaniel,* 47 Ga. 195, the order of sale was as follows: "The application of Thomas A. Blanchard, administrator of Uriah Blanchard, to sell the lands belonging to the estate of said Uriah Blanchard, having been published according to law, and no one coming forward and objecting; it is ordered that Thomas A. Blanchard, administrator, have leave to sell the lands belonging to the estate of Uriah Blanchard, deceased." Speaking of an objection to this order, the court said: "But it is said that the order of sale is void because it does not more definitely describe the land ordered to be sold. Section 2518 of the Code requires the order to 'specify' the land 'as definitely as possible.' Conceding that the land is not so specified, yet it appears to a majority of the court that this is only directory to the ordinary, certainly not an objection which can be successfully urged in a collateral attack upon the judgment."

In considering a statute similar to our section 7569 above, the supreme court of Texas in *Davis* v. *Touchstone,* 45 Tex. 490,

said: "The provisions of the statute requiring the order to describe the property to be sold, like the provision requiring the application of the administrator to be accompanied by an estimate of expenses, claims, and to be verified by affidavit, must be regarded as directory."

"It is well settled that the description in the order of sale may be aided by other portions of the probate record." (*Crawford* v. *McDonald*, 88 Tex. 626, 33 S. W. 325.)

In *Wells* v. *Polk*, 36 Tex. 120, the order of sale referred to the land as any land and as much land of the estate as will suffice to pay the debts of the estate; and of this the court said: "Though there may have been irregularity in the order of the probate court, it was not such as to render the proceeding absolutely void; and it cannot, therefore, be collaterally impeached. The probate court had jurisdiction to order the sale of the land, and, though the order may not have been made in the precise manner pointed out by the statute, it was not void."

In *Schnell* v. *City of Chicago*, 38 Ill. 382, 87 Am. Dec. 304, the inventory and order of sale each described the land as in section 23, while in fact it was in section 33. The court said: "The petition describes the land correctly as in section 33, but the order of sale directs that the land in the petition be sold, namely, lots 45, 46, 48, and 49, in section 23. The notice of the sale contained a true description of the location of the lots, and so does the deed from the administrator to the appellee. If the intestate was shown to have possessed lands in section 23, or if it had been shown that section 23 had been subdivided into outlots, numbered as these are numbered, there might be some ground for the objection. But nothing of the kind is shown, and this misdescription of the section in the inventory and order of sale must be held to be a mere clerical error, not affecting the validity of the sale, since it is clear the proper lots prayed to be sold were sold, and were the lots intended to be sold. The description is as particular in the petition as in the inventory and order of sale, and the lands described in the petition were the lands ordered to be sold."

Counsel for respondents cite *Hanson* v. *Ingwaldson,* 77 Minn. 533, 77 Am. St. Rep. 692, 80 N. W. 702, and *Melton* v. *Fitch,* 125 Mo. 281, 28 S. W. 612, as leading cases which hold a sale void under such circumstances as here presented. It will be observed however, that in *Hanson* v. *Ingwaldson* the court said: "But the records of the probate court received in evidence show that in the inventory of Hanson's estate, *and in all other records and papers* relating to the sale, except the administrator's deed, the land was described as situate in section 13, township 101, range 5, instead of range 6." And in Missouri it would appear that the rule that reference may be had to other probate records to aid the order is not recognized.

In the case before us the petition to sell the real estate correctly describes it, and declares it to be "all the real estate of which the deceased died seised or in which he had any interest, or in which said estate has since acquired any interest." In the order of sale reference is made to the petition, and the court having found that due publication of the order to show cause had been made, and it appearing to the court that it was necessary and for the best interests of the estate and all parties interested therein "*that the real estate of the decedent*" should be sold, the order was accordingly made. In her return of the sale the administratrix states that she caused notices to be given of the intended sale, in which notices the land was described with common certainty (and correctly described), and at the time and place mentioned in the notices she sold *said real estate.* In the order of confirmation the court recites that, after a full hearing, it appeared that the administratrix had sold the land, correctly described, to the highest and best bidder, etc., "and. all and singular the law and the premises being by the court here seen, heard, understood, and fully considered, wherefore it is by the court ordered, adjudged, and decreed that the *said sale* be and the same is hereby confirmed and approved and declared valid, and the proper and legal conveyances of said real estate are hereby directed to be executed to said purchaser by said Mary Boyer, administratrix of the estate of said Neptune

Lynch, Sr., deceased." It further appears that on the same day the administratrix executed and delivered to the purchaser a deed for the property, again correctly describing it. From a consideration of all these records we think it clearly appears that the misdescription in the order of sale is but a clerical error.

If the estate had been interested in more than one piece or parcel of land, and after a hearing the district court or judge had directed one parcel or a number of parcels less than all to be sold, then the importance of the description in the order would become manifest at once. But, under the circumstances of this case, where there was but a single piece of land involved, and it was correctly described throughout by sectional subdivisions, by section and township, and accurately described in the petition and the notices of sale, in the order of confirmation and in the deed, and the order of sale refers to the petition and attempts to direct the sale of the same property; where the sale appears to have been fairly conducted and no one could possibly be injured or misled by the mistake in the order; where the purchaser has parted with his money and the estate has, and indirectly these heirs have, reaped the benefit; where the purchaser has been let into possession, and, acting in good faith, has changed its situation, has sold a large portion of the property to others, city additions have been platted from portions of the land, and a considerable time has elapsed—we do not think the mere mistake in writing into the order the figures "25" for "26" should be held to vitiate the entire proceeding. "Public policy requires that there should be stability in judicial sales, and therefore every reasonable presumption should be indulged in favor of sustaining them, and they should not be disturbed for slight causes, nor should the courts be astute in finding out objections to them." (17 Am. & Eng. Ency. of Law, 994.)

If, then, the court had jurisdiction to make the order, and the order itself is not void, any defects in the proceedings were errors within jurisdiction and subject to review on appeal in the probate proceedings only, and not subject to attack in a col-

lateral proceeding such as this. As was said in *Devincenzi's Estate,* above: "The order of sale was made May 12, 1896, and was an appealable order. Any error that the court may have committed in making it could have been corrected only upon a direct appeal therefrom. If, however, the petition upon which the order was made is so defective that the court did not acquire jurisdiction, the order may be assailed at any time upon a collateral as well as upon a direct attack; but, if the facts stated in the petition were sufficient to confer jurisdiction upon the court to hear the application, its order directing a sale cannot be impeached upon a collateral attack. (*Morrow* v. *Weed,* 4 Iowa, 77, 66 Am. Dec. 122; *Bryan* v. *Bauder,* 23 Kan. 95; *Burris* v. *Kennedy,* 108 Cal. 331, 41 Pac. 458.)" And in *McNitt* v. *Turner,* 16 Wall. 352, 21 L. Ed. 341: "Jurisdiction is authority to hear and determine. It is an axiomatic proposition that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceedings, being *coram judice,* can be impeached collaterally only for fraud. In all other respects it is as conclusive as if it were irreversible in a proceeding for error." (See, also, 18 Cyc. 802.)

Whatever may be said of the particular means by which the payment for the property was made, in law it amounted to a payment of the purchase price to the administratrix. Apparently McGowan, the purchaser, parted with his money in good faith, and received a deed for the property. The failure of the petition to comply literally with section 7562, and to state all the facts required by that section to be stated, and the other errors herein considered, amount only to irregularities in the proceedings, which are to be disregarded; for section 7625 provides that a sale by an administratrix of her decedent's real estate to a purchaser for a valuable consideration paid to such administratrix in good faith (and such sale has not been set aside by the district court) shall be sufficient to sustain the deed given by such administratrix to the purchaser, and all irregularities in obtaining the order of court for such sale, and all irregularities in making or conducting the same by such administratrix shall

be disregarded. In our opinion the probate proceedings were not so far irregular or defective as to render the sale void or open to collateral attack.

The judgment and order are reversed, and the cause is remanded to the district court, with directions to set aside the judgment and order heretofore made, and to enter a decree in favor of the plaintiffs, quieting their title to the land in controversy.

Reversed and remanded.

MR. JUSTICE SMITH concurs.

MR. CHIEF JUSTICE BRANTLY: I dissent. I think that the petition for the order of sale fails to meet substantially the requirements of the statute, and that the order itself is fatally defective, in that it describes property other than that belonging to the estate. I think the proceedings void.

REINO, RESPONDENT, *v.* MONTANA MINERAL LAND DEVELOPMENT CO., APPELLANT.

38 291
38 532
38 291
40 225

(No. 2,583.)

(Submitted December 23, 1908. Decided February 8, 1909.)

[99 Pac. 853.]

Personal Injuries—Master and Servant—Mines—Negligence—Evidence—Insufficiency—Duty of Master—Erroneous Instruction.

Personal Injuries—Negligence—Evidence.

1. Negligence must be shown; it will not be presumed.

Same—Master and Servant—Mines—Negligence—Evidence—Insufficiency.

2. Plaintiff, a miner, while working at the bottom of a mining shaft, was injured by a bucket, used for hoisting waste, falling upon him. The evidence merely showed that the bucket had been hanging over the shaft and that the boxing on one end of the drum around which the cable attached to the bucket ran, having become loose, the engineer removed it preparatory to remedying the defect, and that thereupon the brake holding the drum stationary released its hold and the bucket fell. The evidence failed to show that the engineer ought reasonably to have anticipated that the removal of the boxing from the drum would cause the brake to be released and the bucket to be

precipitated down the shaft. *Held,* under the rule that negligence is the proximate cause of an accident only where it is such that a person of ordinary intelligence should have foreseen that injury was likely to be caused by his act or omission, that the evidence failed to establish negligence on the part of the engineer.

Same—*Res Ipsa Loquitur*—Inapplicability of Maxim.

3. Under the circumstances recited in the foregoing paragraph, the maxim, "*Res ipsa loquitur,*" had no application.

Same—Duty of Master—Erroneous Instruction.

4. An instruction that the servant has the right to presume, and to act upon such presumption, that defendant master would at all times use ordinary care to *protect* the plaintiff, etc., placed too great a burden upon the master, since the latter is only bound to use reasonable care to provide a reasonably safe place in which to work, reasonably safe appliances with which to perform his duties, and reasonably competent fellow-servants with whom to work.

Appeal from District Court, Jefferson County; Lew L. Callaway, Judge.

ACTION by Abraham Reino against the Montana Mineral Land Development Company. From a judgment for plaintiff and an order denying it a new trial, defendant appeals. Reversed and remanded for new trial.

Messrs. Kremer, Sanders & Kremer, and *Messrs. Walsh & Nolan,* for Appellant.

Messrs. Walsh & Newman, and *Mr. C. R. Stranahan,* for Respondent.

Appellant's contention that there is no issue of fact in the record on the question of negligence of appellant is without merit. In a case of this character, it is sufficient if, upon all the evidence, it appears that, while the plaintiff was below in a place of danger, the defendant or its engineer changed the ordinary or usual conditions of things whereby the danger was increased or rendered extraordinary. This the engineer did in undertaking to take apart the machinery sustaining the bucket in position, and that without warning to the plaintiff and without removing the bucket or putting a support under it. (See *Christianson* v. *Chicago etc. Ry. Co.,* 67 Minn. 94, 69 N. W. 640; *Jensen* v. *Commodore Min. Co.,* 94 Minn. 53, 101 N. W. 944;

Morey v. *Lake Superior T. & T. Ry. Co.*, 125 Wis. 148, 103 N. W. 271.)

The servant assumes the natural and ordinary risks incident to his employment, but the negligence of the master, or those acting in his place, is not among the risks so assumed. Whenever the master's negligence or the negligence of the person acting in his place is the proximate cause of the injury to the servant, the master is liable. (*City of Emporia* v. *Kowalski*, 66 Kan. 64, 71 Pac. 232; *Hone* v. *Mammoth Min. Co.*, 27 Utah, 168, 75 Pac. 381; *Pittsburgh Ry. Co.* v. *Lightheiser*, 168 Ind. 438, 78 N. E. 1033; *Chicago & E. R. Co.* v. *Lawrence*, 169 Ind. 319, 79 N. E. 363, 82 N. E. 768; *Miller* v. *Union Mill Co.*, 45 Wash. 199, 88 Pac. 130; *Schillinger* v. *Smith*, 225 Ill. 74, 80 N. E. 65; *Dunne* v. *Jersey City*, 73 N. J. L. 586, 64 Atl. 1076; *McCabe Co.* v. *Wilson*, 17 Okl. 355, 87 Pac. 320; *Choctaw etc. Ry. Co.* v. *Jones*, 77 Ark. 367, 92 S. W. 244; *Denver & Rio Grande Co.* v. *Warring*, 37 Colo. 122, 86 Pac. 305; *Galveston etc. Co.* v. *Udalle* (Tex. Civ.), 91 S. W. 330; *Rector* v. *Bryant etc. Mill Co.*, 41 Wash. 556, 84 Pac. 7; *Erickson* v. *McNeeley Co.*, 41 Wash. 509, 84 Pac. 3; *Union Pac. Ry. Co.* v. *O'Brien*, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. Ed. 766; *Hammond Co.* v. *Mason*, 12 Ind. App. 469, 40 N. E. 642; *Davis* v. *New York Ry. Co.*, 159 Mass. 532, 34 N. E. 1070.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action for damages for personal injuries. The plaintiff recovered judgment and the defendant appeals from the judgment and from an order denying it a new trial. At the close of plaintiff's case the defendant moved for a nonsuit, which was denied, and this ruling is specified as error.

1. The plaintiff testified that he was working for the defendant as a miner in a double-compartment inclined shaft, eighty-five feet deep; that a bucket was used to hoist waste, the bucket being raised and lowered by a stationary engine near the mouth of the shaft. It appears that a cable was attached to the bucket,

then run over a pulley in the gallows frame, and down to and around a drum, the drum being operated by the engine; that the movements of the drum could be controlled by a friction clutch, gear, or brake, so that, when the bucket was at the surface, it could be held in that position by means of this brake operating on the drum. The plaintiff further testified that on the occasion of his injury the bucket had been raised to the surface; that he was at the bottom of the shaft at work, when, without warning to him and without any opportunity to escape, the bucket fell upon him, crushing one of his legs to such an extent that amputation of the foot was necessary. He testified that a Mr. Ward was the engineer who at the time was in charge of and operating the hoisting engine. He also testified concerning his age, earning capacity before his injury, and his condition after his injury. Dr. Ward also told of the plaintiff's injury and of his having amputated the plaintiff's foot. A witness Peterson, who was also an engineer and who was to take Ward's place on the succeeding shift, testified that he was at the engine at the time of the accident, which occurred some time before he was to go on shift. These questions were then propounded to him, which he answered: "Q. Go on and tell us how the engine was operated and the raising and lowering of the bucket, particularly describe the drum; what it was that held the bucket up, and what loosened it to let the bucket go down. A. There was a platform there, and the engineer pulled on the rope that throwed the platform back, and there was a chain on the bucket and washer, and a slot that the chain dropped in; we pulled that over, and that lowered the bucket a little. It would tip it right over and into the car, and we would raise the bucket back up again and that pulled the trapdoor back and the bucket was already over the shaft to be lowered. Q. How did you lower the bucket? A. We loosened the friction. Q. You loosened the friction and it goes down that way? A. Yes, sir. Q. What was it that held the bucket that night as it hung over the shaft? A. The brake. Q. Go on and tell us what Mr. Ward was doing, tell us all about it, and tell what occurred. A. Mr. Ward took

the box off from one end of the drum, and was going to shim it up, put some shims in. The boxing was loose, and he was going to shim it up, and the drum raised up and come out of gear so that the brake would not hold it, and the bucket went down, and that is when Reino was hurt. Q. Could the bucket as it hung there have been pulled over or swung over on the ground by the side of the shaft while doing that work? A. Yes, sir; it could have been." This is the substance of all of plaintiff's testimony. Does it show or tend to show negligence on the part of Ward, the engineer? It is a general rule that negligence must be shown. It will not be presumed. In *Rysdorp* v. *George Pankratz Lumber Co.*, 95 Wis. 622, 70 N. W. 677, it is said: "Negligence is the cause of the accident, in a legal sense, only when it is of such a character as that men of ordinary prudence, judgment, and experience ought reasonably in the light of the attending circumstances to have foreseen that it was likely to produce such an accident."

In 1 Thompson's Commentaries on the Law of Negligence, it is said: "As will more fully appear in the next title the law does not impute negligence to an injury that could not have been foreseen or reasonably anticipated, as the probable result of a given act or omission. * * * " (Section 28.) "It follows that the negligence of a person cannot be the proximate cause of a harm to another following it, unless, under all the attending circumstances, ordinary prudence would have admonished the person sought to be charged with the negligence that his act or omission would probably result in injury to some one. The general test as to whether negligence is the proximate cause of an accident is therefore said to be whether it is such that a person of ordinary intelligence should have foreseen that an accident was liable to be produced thereby." (Section 50.)

The general rule of law applicable in a case of this character is very fully stated in *Morey* v. *Lake Superior T. & T. Co.*, 125 Wis. 148, 103 N. W. 271, 12 L. R. A., n. s., 221, as follows: "It is not required that the 'specific' injury or 'such' an injury as is complained of was or ought to have been specifically antici-

pated as the natural and probable consequence of the wrongful act. It is sufficient if the facts and circumstances are such that the consequences attributable to the wrongful conduct charged are within the field of reasonable anticipation; that such consequences might be the natural and probable results thereof, though they may not have been specifically contemplated or anticipated by the person so causing them." (See, also, 1 Thompson's Commentaries on the Law of Negligence, sec. 59.)

But the difficulty presented here is that the evidence is barren of any facts showing or tending to show that Ward, the engineer, ought reasonably to have anticipated that the removal of the boxing from the drum would cause the brake to be released and the bucket to be precipitated down the shaft. If the plaintiff had shown the relation of the several pieces of machinery, one to the other; that the relation of the brake to the drum was such that, if the drum was moved, the brake would cease to perform its functions; that the relation of the boxing to the drum was such that, if the boxing was removed, the weight of the bucket on the cable would move the drum from its position and release the brake; that the relation of the bucket to the drum was such that, if the drum was not held stationary by the brake, the weight of the bucket would cause the drum to revolve, and the bucket to be let down with force sufficient to cause injury, it would have been for the jury to say whether in removing the boxing Ward, as a reasonable man, ought to have anticipated that the bucket might be precipitated with force down the shaft, or, in other words, whether he ought to have anticipated that the falling of the bucket would be the natural, though not the necessary or inevitable, result of the removal of the boxing. (1 Thompson's Commentaries on the Law of Negligence, sec. 59.)

The maxim, "*Res ipsa loquitur*" does not have any application to facts such as are shown here. The only fair inference deducible from plaintiff's evidence is that the bucket fell because the drum was permitted to be moved from the brake, so that the brake would no longer hold it, and the drum was caused to be moved by reason of the removal of the boxing. Under these circumstances, the falling of the bucket does not necessarily speak

negligence on the part of Ward in removing the boxing. It may or may not have been negligence on his part, depending upon the circumstances to which we have adverted above.

2. Objection is made to instruction No. 6, given to the jury as follows: "No. 6. The court instructs you that the plaintiff has the right to presume, and to act upon such presumption, that the defendant would at all times use ordinary care to *protect* the plaintiff and other employees, and that the plaintiff had the right to presume, and to act upon the presumption, that at all times the hoisting engineer would exercise ordinary or reasonable care in the handling of his engine and said bucket." Exception is taken to the use of the word "protect." The word is defined as follows: "To guard, shield, preserve." (Webster's International Dictionary.) "To cover or shield from danger, harm, damage, trespass, exposure, insult, temptation or the like; defend; guard; preserve in safety; synonyms: defend; shield; screen; secure." (Century Dictionary.) "To cover, shield or defend from injury, harm or danger of any kind." (Encyclopedic Dictionary.) We must assume that the jury understood this word according to its commonly accepted meaning; and, if they did so understand it and construed the instruction accordingly, it is manifest that a greater burden was cast upon the defendant company than is authorized by law. The rule of the master's liability, and, in fact, the limit of such liability, is to use reasonable care to provide his servant with a reasonably safe place in which to work, reasonably competent fellow-servants with whom to work, and reasonably safe appliances with which to work. (*Anderson* v. *Northern Pacific Ry. Co.*, 34 Mont. 181, 85 Pac. 884; *Fearon* v. *Mullins*, 35 Mont. 232, 88 Pac. 794; *Longpre* v. *Big Blackfoot Milling Co., ante*, p. 99, 99 Pac. 130, just decided.)

For the reasons stated, the judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

Rehearing denied March 10, 1909.

McLEAN, APPELLANT, v. MORAN, RESPONDENT.

(No. 2,596.)

(Submitted December 24, 1908. Decided February 8, 1909.)

[99 Pac. 836.]

Summons—Service—Nonresidents—When Complete—Default—Premature Judgment—Vacation.

1. A nonresident of the state, when personally served with summons together with a copy of the complaint, in lieu of publication and mailing, after an order of publication has been made (Revised Codes, sec. 6521), has the full period of four weeks and twenty days in which to make his appearance; therefore, where a default was entered twenty-two days after a nonresident had been so served, the judgment was premature, and the action of the court in vacating the judgment, on motion for that reason, was correct.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by Winifred A. McLean against Hannah Moran. From an order vacating a default judgment, plaintiff appeals. Affirmed.

Mr. W. F. Davis, and *Mr. A. J. Rosier*, for Appellant.

Messrs. Breen & Hogevoll, for Respondent.

MR. JUSTICE HOLLOWAY, delivered the opinion of the court.

This action was originally brought against the New York Life Insurance Company to recover upon a policy of insurance. The insurance company appeared and admitted its liability, but set forth that Hannah Moran, individually and as administratrix of the estate of Patrick H. McGuire, deceased, claimed the amount due on the policy, and asked leave to deposit the amount in court and to have Hannah Moran substituted as defendant.

The order of substitution was made, and plaintiff thereupon redrafted her complaint, and asked for an order for the publication of the summons, as the defendant Moran was a resident of the state of Pennsylvania. The order of publication was made, but, instead of causing the summons to be published and a copy to be mailed, the plaintiff had a copy of the summons, together with a copy of the complaint, served upon defendant Moran in Pennsylvania on April 16, 1908. On May 7, 1908, the default of the defendant Moran was entered for failure of an appearance, and, proof being made, a judgment was rendered in plaintiff's favor. On May 8, 1908, the defendant Moran moved the court to vacate the judgment and set aside the default on the ground that the judgment was premature. This motion was granted, and, from the order granting it, the plaintiff appealed.

But a single question is presented for solution, viz.: When is the service of summons complete upon a defendant residing in another state, in the event a copy of the summons, together with a copy of the complaint, is served in lieu of publication and mailing, when an order of publication has been made? In 1879 our statute read as follows: "When publication is ordered, personal service of a copy of the summons and complaint out of the territory is equivalent to publication and deposit in the post-office, and in either case the service of the summons is complete at the expiration of the time prescribed by the order of publication." (Rev. Stats. 1879, First Division, sec. 74.) In 1887 the statute was changed to read: "In all cases where an order of publication is made, personal service of the summons and a copy of the complaint shall be deemed a compliance with said order and the provisions of this Act. * * * The service of the summons shall be complete on the day the fourth publication shall be made in said newspaper or on the day the said summons and copy of the [same] shall be personally served on the said defendant." (Compiled Statutes, 1887, First Division, sec. 74.) In 1895 the statute was again changed to read as fol-

lows: "When publication is ordered, personal service of a copy of the summons and complaint out of the state is equivalent to publication and deposit in the postoffice. The service of summons is complete on the day of the fourth publication." (Revised Codes, sec. 6521.)

We have not been able to find another statute like our present one above. The statute in force in New York in 1870, and for many years prior thereto, read: "When publication is ordered, personal service of a copy of the summons and complaint, out of the state, is equivalent to publication and deposit in the postoffice." (Voorhies' New York Annotated Code, sec. 135, p. 167.) "In the cases mentioned in section 135, the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication." (Section 137.) Speaking of these provisions, the court of appeals of New York, in *Brooklyn Trust Co.* v. *Bulmer,* 49 N. Y. 84, said: "It is held, and we think correctly, in *Tomlinson* v. *Van Vechten,* 6 How. Pr. 199, and in *Abrahams* v. *Mitchell,* 8 Abb. Pr. 123, that, where personal service is thus made out of the state, such service is not complete until the time prescribed for the publication has expired. Section 137 requires the lapse of this time to render the service complete in all the cases mentioned in section 135. It makes no exception where personal service is, pursuant to the same section, substituted for actual publication."

The statute of Idaho is identical with our statute of 1879, and in construing it the court in *Bowen* v. *Harper,* 6 Idaho, 654, 59 Pac. 179, said: "When publication is ordered, personal service of a copy of the summons and complaint out of the territory is equivalent to publication and deposit in the postoffice; and in either case the service of the summons is complete at the expiration of the time prescribed by the order for publication. * * * The qualifying words, 'in either case,' in the last clause of the statute under consideration, relate to both of the modes of serving the summons upon the absent defendant provided for in said statute; i. e., in case of publication of the sum-

mons and in case of personal service out of the state. In the first case the service becomes complete at the expiration of the time prescribed in the order for publication, computing from the date of the first publication, and in the last case it becomes complete at the expiration of such time, computing from the date of making the personal service out of the state."

These statutes appear so plain that we wonder that any contention could ever arise as to their meaning. For some sufficient reason our legislature in 1887 changed the statute so that in the event a copy of the summons, together with a copy of the complaint, was served out of the state in lieu of publication and mailing, the service was complete on the day the summons and copy of the complaint were served. The provision of 1879 was definite and certain in meaning, as likewise was that of 1887, and we are unable to understand why these or either of them should have been abandoned for the indefinite and uncertain provision of our present Code; but, when the change was made in 1895, we must presume that the legislature intended to establish a different rule, otherwise the provision of 1887 would have been retained. This is a canon of construction recognized generally.

Section 6521, then, provides for two modes of service upon a defendant residing in another state—one by publication and mailing, and the other by delivering to the defendant personally a copy of the summons together with a copy of the complaint. The section then concludes: "The service of summons is complete on the day of the fourth publication." What service? Manifestly the service just mentioned in the preceding portion of the section; that is, the service by publication and mailing or by delivering a copy of the summons together with a copy of the complaint. The word "equivalent" means: "Equal in worth or value, force, power, effect, import and the like." (Webster's International Dictionary.) In other words, as a means of giving notice, the service of a copy of the summons, together with a copy of the complaint, is of equal worth with publication and

mailing. The fact that the provision of the statute of 1887 was abandoned would seem to indicate that the legislative intent was to give to a defendant served out of this state more time for appearance than is extended to one served in this state, and whether that service is made by publication and mailing or by delivering a copy of the summons, together with a copy of the complaint to the defendant personally, the person so served shall have the full period of four weeks and twenty days within which to make his appearance. This appears to be the object and meaning of the statute, if its meaning can be derived from the language employed, and the purpose to be accomplished.

Under this view the order is correct, and is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

HEAD ET AL., APPELLANTS, *v.* HALE ET AL., RESPONDENTS.

(No. 2,595.)

(Submitted December 21, 1908. Decided February 8, 1909.)

[100 Pac. 222.]

Water Rights—Placer Mining—Rights of Lower Appropriators—Abandonment—Subsequent Appropriation—Relation Back.

Water Rights—Placer Mining—Recapture of Water.

1. Water used for placer mining purposes is subject to recapture and appropriation by farmers on the stream below.

Same—Change of Use—When not Permissible.

2. While a person entitled to the use of water may change the point of its diversion and use it for other purposes than that for which it was originally appropriated, this may not be done if persons on the stream below him are injured thereby; hence where water had been appropriated for placer mining purposes, the successors of the appropriator could not so change its use as to deprive lower appro-

priators of their rights, theretofore acquired, in the use of it for irrigating purposes.

Same—Abandonment—Subsequent Appropriation—Title—Relation Back.

3. Where upon the death of one who had held public lands under a squatter's right and appropriated water for placer mining purposes, there was no one to take the land under the laws of succession or by devise, and the premises thereafter remained without a claimant or owner for about two years, when others, not in privity with the original occupant, went into possession as upon unoccupied public lands for mining purposes, their rights to the use of the water did not relate back to the date of the appropriation made by the decedent, but had their inception as of the date of their entry, even though they repaired and used the ditches of the original claimant.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by Charles H. Head and others against Robert S. Hale and others. From a decree granting insufficient relief and an order denying a new trial, plaintiffs appeal. Reversed and remanded.

Messrs. Walsh & Newman, and *Messrs. Gunn & Rasch,* for Appellants.

Messrs. McConnell & McConnell, for Respondents.

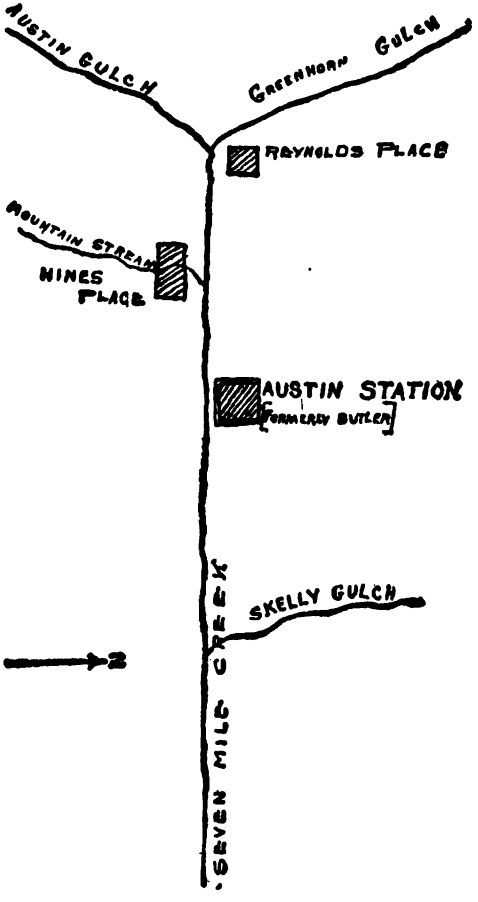
MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action grew out of a controversy between the plaintiffs and defendants over the use of the water flowing in Seven-Mile creek and its tributaries, in Lewis and Clark county, and was brought to have determined the priorities of their several rights and for a perpetual injunction to restrain the defendants from diverting it or any of it to the detriment of plaintiffs' rights. The trial court heard the evidence upon the issues made by the parties, and entered a decree fixing the dates and amounts of their respective appropriations and enjoining them from interfering with the rights of the others. The plaintiffs, being

dissatisfied with the decree in so far as it declared defendant Hines and the Northern Pacific Railway Company entitled to a priority over them, moved for a new trial upon the questions at issue between themselves and these defendants. This motion was denied. The plaintiffs thereupon appealed from the decree and the order denying their motion.

The contention made in this court is that the evidence submitted at the trial was not sufficient to sustain the findings as to the rights referred to. The rights of the other defendants are not brought in question. Plaintiffs assert the right to the use of two hundred and twenty-five inches under an appropriation by their predecessors in interest out of the main stream in the month of July, 1864, and continuous use of this quantity from that time until the bringing of the action, except when their rights had been interfered with by the defendants. It is alleged that all of the defendants other than the Northern Pacific Railway Company, during the summer of 1904 had wrongfully diverted the water from the stream and its tributaries to lands owned by them, thus depriving the plaintiffs of the use of it, and that they threatened to continue thus to invade the plaintiffs' rights, to their irreparable damage. As against the Northern Pacific Railway Company it is alleged that it maintains water-tanks at various points along the line of its road in Lewis and Clark county where it is in proximity to the stream, for the purpose of supplying its locomotives with water and for general purposes in connection with the operation of its road, and that during the summer of 1904, by means of pumps, ditches, canals, and other devices located at points above the heads of plaintiffs' ditches, it diverted from the stream large quantities of water, to the use of which the plaintiffs were entitled, and had continued this diversion down to the bringing of this action, to the irreparable damage of plaintiffs. Seven-Mile creek has its source in the mountains in the western part of Lewis and Clark

county, and flows toward the east. The subjoined sketch will serve to illustrate the contentions of the parties.



The plaintiffs' lands are situate east of Austin station and below the mouth of Skelly Gulch, and, so far as we can learn from the record, the heads of their ditches are below this tributary. The railroad of the defendant company, running westward, proceeds up the stream to Austin station, where it turns to the northwest. Defendant Hines asserts his right under three separate appropriations—one, of all the water flow-

ing in the tributary falling into the main stream from the south, and designated as "Mountain Stream," alleged to have been made in the spring of 1865; a second from Greenhorn Gulch, of the same date and amounting to fifty inches; and the third from Austin Gulch, amounting to fifty inches, made in the spring of 1867. These appropriations it is claimed were made by one Beheim, who was then in possession of the lands now occupied by Hines, and under whom Hines claims as successor in interest. The defendant Northern Pacific Railway Company is the successor in interest of the Northern Pacific Railroad Company, the builder and original owner of the Northern Pacific railroad, extending from Lake Superior to Puget Sound. This defendant became its successor on September 1, 1896. When the line of road was built through Lewis and Clark county in 1883, a station was established at Austin. In order to obtain a supply of water for its locomotives and for general purposes, it built a tank and installed a pumping plant at this point. It obtained water from a well sunk on its own land. This well was supplied by drainage from Seven-Mile creek. The amount diverted from this source was and is three and forty-three hundredths inches, and was and had been used without reference to the amount flowing in the stream. On July 18, 1885, as a precaution against any failure of this supply and to meet its increasing necessities, this defendant purchased from two of the predecessors of the defendant Hines—J. C. Sloan and T. H. Coulter—who had possession at that time of the lands and water rights which Hines now owns, the use of ten inches of water flowing in the "Mountain Stream," together with the right to construct a reservoir on their lands for storage purposes. Subsequently it acquired other rights, one by purchase and others by appropriation. Description of these or further reference to them is not necessary, because they are not in question on this appeal. Upon the allegation of these facts this defendant bases its claim, and its right is not questioned. The date to which it must be made to relate, however, depends upon the date properly assignable to the Beheim or Hines appropriations. The court found that

Beheim made an appropriation of all the water in the mountain stream in May, 1865; of fifty inches out of Greenhorn Gulch at the same time; and of fifty inches out of Austin Gulch in the spring of 1867. Plaintiffs' appropriation of two hundred and twenty-five inches was found to have been made on June 11, 1865. The plaintiffs' contention is that the evidence does not justify a finding that any of the Hines rights relate to a date earlier than the spring of 1881.

It is not disputed that Beheim built a cabin on the land now occupied by Hines as early as 1867, and from and after that time until his death in 1879, diverted water from the "Mountain Stream" to irrigate a small garden, and that he used it for this purpose as well as for placer mining along Seven-Mile creek, with other water diverted from the main stream or the tributaries Austin and Greenhorn Gulches. Adopting the most liberal view of the evidence, the date of his alleged appropriations could not be fixed at an earlier date than the fall of 1865, which would necessarily assign to all the Hines rights later dates than those of plaintiffs, and make them inferior in point of priority. It is also impossible to reach a conclusion that any serious effort to use water for irrigation was ever made by Beheim, or any other person who occupied the Hines property after his death until Sloan and Coulter came into possession of it in 1881; for the only portion of the land ever cultivated until 1881 was the Beheim garden, which one of the witnesses said had an area about as extensive as the courtroom in which the court was sitting at the time of the trial. No witness estimated its area to be greater than two acres. Except for the irrigation of this small area, the diversions by Beheim were for placer mining purposes along the creek on what are now the Hines lands and upon lands some distance below. The water used for this purpose naturally found its way back into the stream, and was subject to recapture by the farmers on the stream below and to be appropriated to agricultural uses. (*Alder Gulch Con. Min. Co.* v. *King*, 6 Mont. 31, 9 Pac. 581.) Sloan and Coulter could not thereafter change the use to which Beheim had put the water

to another and different use, and thus deprive the agricultural appropriators. A person entitled to the use of water may change the point of its diversion, and may use it for other purposes than that for which it was originally appropriated, provided always, however, other parties are not injured thereby. (Revised Codes, sec. 4842.) Even in the absence of this statutory declaration the rule would be the same. (*Columbia Min. Co.* v. *Holter*, 1 Mont. 296; *Gassert* v. *Noyes*, 18 Mont. 216, 44 Pac. 959; *Hague* v. *Nephi Irr. Co.*, 16 Utah, 421, 67 Am. St. Rep. 634, 52 Pac. 765, 41 L. R. A. 311; *Cache La Poudre Reservoir Co.* v. *Water S. & S. Co.*, 25 Colo. 161, 71 Am. St. Rep. 131, 53 Pac. 331, 46 L. R. A. 175; Kinney on Irrigation, sec. 234.)

But it is not here important to inquire when Beheim made his appropriations, or for what purpose he made them, or the actual use made of them by him during his lifetime. He had only a squatter's right in the lands, and, when he died, there was no heir or other person who followed him under the laws of succession or by devise. The lands, forty acres in extent, seem to have been considered as abandoned. In any event, they remained without claimant or owner until 1881, when possession was taken by Sloan and Coulter, whom Hines succeeded in 1895, and from whom the Northern Pacific Railroad Company acquired its right in 1885. There is no suggestion in the evidence that Sloan and Coulter were the successors of Beheim by conveyance or under the laws of succession, or that they went into possession under any other claim than that of one who enters upon unoccupied public lands for mining purposes. Whatever rights they had, therefore, were obtained by appropriation as of that date, though it be considered, as the evidence shows the fact to be, that they thereafter repaired and used the Beheim ditches. In Farnham on Waters, section 670a, the rule of law on this subject is stated thus: "The question whether or not one in possession of a water right at a given time, which was originated by another, has sufficient title thereto to enable him to protect and defend it, depends upon whether or not he is in privity with the original owner. The rights of an owner of

land claiming water as appurtenant thereto do not relate back to the inception of the alleged right in the appropriation made by the original settler of such land, where there is no proof of any contractual relation between his predecessor in title and such original settler, either directly or indirectly touching the settler's rights, and it is not apparent that his predecessor ever acquired such rights from such settler." It was applied by this court in *Hays* v. *Buzzard*, 31 Mont. 74, 77 Pac. 423, and is the rule of decision in all the arid states where the question of succession has been considered. (*Union Milling & Mining Co.* v. *Dangberg* (C. C.), 81 Fed. 73; *Chiatovich* v. *Davis*, 17 Nev. 133, 28 Pac. 239; *Low* v. *Schaffer*, 24 Or. 239, 33 Pac. 678; *Utt* v. *Frey*, 106 Cal. 392, 39 Pac. 807.)

The findings, in so far as they fix the date of any of the defendants' rights here involved, are not justified by the evidence. It is not necessary, however, to order a new trial. The cause is remanded to the district court, with directions to amend its findings so as to fix the date of these appropriations as of the spring of 1881, and to amend the decree accordingly.

Reversed and remanded.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

STATE, RESPONDENT, *v.* BROWN, APPELLANT.

(No. 2,610.)

(Submitted January 14, 1909. Decided February 15, 1909.)

[99 Pac. 954.]

Criminal Law—Larceny by Bailee—Indictment—Partnership—Executory Agreement—Evidence—Exclusion—Harmless Error.

Criminal Law—Motion in Arrest of Judgment—Appeal.

1. An appeal does not lie from an order overruling a motion in arrest of judgment. Such an order is reviewable only on appeal from the judgment.

Same—Larceny by Bailee—Indictment—Sufficiency.

2. An indictment charging defendant with larceny as bailee in the words of the statute (section 8642, Revised Codes) and in the form

prescribed by section 9148, was sufficient, and not open to the objection that it failed to describe the character of bailment.

Same—Executory Agreement of Partnership—Larceny by Bailee.

3. While partners cannot commit larceny of the funds or property of the partnership, this immunity does not attach so long as the partnership agreement is executory only and the conditions of the agreement remain unfulfilled.

Same.

4. Defendant and the prosecuting witness entered into an agreement to engage as partners in a business venture, the former furnishing the experience and the latter the means. The complaining witness turned over certain sums of money to defendant for the purpose of obtaining a license, purchasing supplies, etc., who thereupon appropriated the money to his own use and absconded. *Held*, that the contract of partnership was never executed, but that defendant repudiated it by his conduct, and thus became the bailee of his prospective partner.

Same—Evidence—Exclusion—Harmless Error.

5. Error in excluding an offer of proof tending to show that the complaining witness in a prosecution for larceny by bailee had turned over to defendant less money than he claimed, was cured by the admission of testimony which included all the evidence in the offer.

Appeal from District Court, Yellowstone County; Sydney Fox, Judge.

C. M. BROWN was convicted of grand larceny; and, from the judgment and from an order denying a new trial, he appeals. Affirmed.

Mr. Charles L. Harris, for Appellant.

The indictment in this case is defective because the bailment is not set out. (*Carter* v. *State*, 53 Ga. 326; *People* v. *Poggi*, 19 Cal. 601; *People* v. *Peterson*, 9 Cal. 315; *People* v. *Cohen*, 8 Cal. 44; *Wilbur* v. *Territory*, 3 Wyo. 268, 21 Pac. 698.)

It is no crime in the state of Montana for one partner to appropriate the money or property of the partnership to his own use and benefit. All the complaining witness Wagner is entitled to in the partnership is what he paid to defendant. He may have an accounting and recover the amount due from defendant in a civil action. The defendant has not committed any crime. (*State* v. *Reddick*, 2 S. D. 124, 48 N. W. 846; *Napoleon* v. *State*, 3 Tex. App. 522; *State* v. *Kent*, 22 Minn. 41, 21 Am. Rep. 764; *Reed* v. *State*, 16 Tex. App. 586; *Dancy* v. *State*, 41 Tex. Cr. 293, 53 S. W. 635, 886; Horton's Criminal

Law, 10th ed., sec. 1054; 1 McClain's Criminal Law, secs. 549, 550.)

Mr. Albert J. Galen, Attorney General, and *Mr. W. L. Murphy*, Assistant Attorney General, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant, charged by indictment with the crime of grand larceny, was convicted and sentenced to a term of imprisonment in the state penitentiary. He has appealed from the judgment and an order denying him a new trial. He has also attempted to appeal from an order overruling his motion in arrest of judgment. He contends that the facts stated in the indictment do not constitute a public offense, and that the court erred to his prejudice in its rulings in admitting and excluding evidence and in denying his motion for a new trial upon this ground, and also upon the ground that the verdict is contrary to the evidence.

1. An appeal does not lie from an order overruling a motion in arrest of judgment. It is not enumerated in the statute among the appealable orders. (Revised Codes, sec. 9397.) It is an intermediate order affecting the judgment, and may be reviewed only on appeal from the judgment. (Revised Codes, sec. 9416; *State* v. *Beesskove*, 34 Mont. 41, 85 Pac. 376.)

2. The charging part of the indictment is that "one C. M. Brown, late of the county of Yellowstone aforesaid, * * * committed the crime of grand larceny, in that the said C. M. Brown, then and there being, and then and there having in his possession, custody, and control, as a bailee of one P. S. Wagner, three hundred and five dollars ($305.00) lawful money and currency of the United States of America, of the value of three hundred and five ($305.00) dollars, then and there the money and property of the said P. S. Wagner, * * * did then and there wrongfully, unlawfully, and feloniously appropriate said money and property to his own use, with the intent

then and there in him, the said C. M. Brown, to deprive the true owner of his said property," etc. The objection made to it is that it does not allege the facts showing the character of the bailment. It was found under the provisions of section 8642, Revised Codes, which declares: "Every person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person either * * * (2) Having in his possession, custody or control, as a bailee * * * any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner, or person entitled to the benefit thereof, steals such property and is guilty of larceny."

It will be observed that the indictment follows almost literally the words employed in the statute to describe the act denounced as larceny. The rules by which its sufficiency must be determined are found in Revised Codes (section 9145). For the guidance of the pleader a form is prescribed. (Section 9148.) This provision was pursued in this case. Section 9156 declares: "The indictment or information is sufficient, if it can be understood therefrom, * * * (6) That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended. (7) That the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case." These provisions were intended to relax the technical rules which prevailed at the common law, and to simplify the procedure to the end that regard to substance, rather than form, should be the rule of interpretation. The indictment here meets the test of these simple requirements. (*State* v. *Stickney*, 29 Mont. 523, 75 Pac. 201.)

Section 8642, *supra*, declares the offense known at the common law as embezzlement to be larceny, and the elements constituting it are stated; the purpose being to dispense with the

trespass which was an element in every larceny at common law. In jurisdictions where there are similar statutes, the general rule is that a charge following the words of the statute is sufficient. Referring to the American decisions on this subject, Mr. Bishop in his work on Statutory Crimes says: "Sec. 422. Such decisions as our own books afford require the allegations to be special on the statute. Therefore, as in other indictments on statutes, the statutory terms may be so far pursued as to identify the statute and comprehend the offense in full. The bailment must be averred; but on principle the particulars of it need not be so, because it is a matter of inducement, and so the mere general allegation will suffice." (See the following cases: *People* v. *Hill*, 3 Utah, 334, 3 Pac. 75; *People* v. *Tomlinson*, 66 Cal. 344, 5 Pac. 509; *McCracken* v. *People*, 209 Ill. 215, 70 N. E. 749; *Strohm* v. *People*, 160 Ill. 582, 43 N. E. 622; *State* v. *Evans*, 27 Utah, 12, 73 Pac. 1047; *State* v. *Keller*, 8 Idaho, 699, 70 Pac. 1051; *State* v. *Whitworth*, 30 Wash. 47, 70 Pac. 254; *Commonwealth* v. *Welsh*, 7 Gray (Mass.), 324; *State* v. *Startup*, 39 N. J. L. 423; *State* v. *Kentner*, 178 Mo. 487, 77 S. W. 522.)

3. Since a statement of the facts appearing in the evidence is necessary to an understanding of the other contentions made, we can most conveniently consider them by reversing the order in which they are urged in counsel's brief. There is some conflict in the evidence as to the amount of money involved in the dealings between the parties, but there is substantial agreement among the witnesses as to all other material facts. The facts may be stated briefly as follows: Wagner, the prosecuting witness, and the defendant, both residents of Yellowstone county, but theretofore comparative strangers to each other, met casually and formed acquaintance at Billings on March 24, 1906. They soon became intimate. Wagner had theretofore worked as a sheepherder and had saved some money. The defendant had been working as a common laborer during the winter. Whether he had knowledge of Wagner's financial condition, except that he had saved some money, does not appear. On that or the following day, upon being questioned by Wagner as to what he

intended to do, defendant stated to him that his present intention was to go to Wyoming "to start a saloon." Wagner expressed the wish to join him in this enterprise, thinking, as he said, he would make more money than he could at his present employment, though he knew nothing of the business. Thereupon, after some negotiations, the particulars of which are not at all material, they entered into an agreement to go to Worland, Wyoming, and open a saloon as partners. Wagner was to furnish the money to obtain a license, a tent in which to install their business until they could secure a building, the glassware necessary for use in the business, and a stock of cigars. The defendant had no money, but by means of credit which he could secure from an acquaintance he was to furnish whisky and beer to the amount of $500. Wagner, having satisfied himself by inquiry that defendant had had experience in that business and could secure the required credit, thereupon paid to defendant $175 to send forward to the authorities in Wyoming for the license, $80 with which to purchase the tent, and $50 with which to buy the glassware and cigars. These payments were made at different times on March 28, as the details of the agreement developed what expenditures were necessary to start the business. It seems that the intention of both parties was to send the money for the license on that day. In any event, they both went to the postoffice to secure money orders for that purpose, but found that they were too late to secure them; the office having been closed. During the evening or the following day, the defendant informed Wagner that he had already secured the tent, the whisky, and the beer. This statement was afterward found to have been false. Pending the negotiations both were drinking more or less. That evening and night the two, in company with another, spent in a drunken carouse visiting various drinking places and brothels, where both spent money freely, Wagner finally losing or being robbed of all he had left upon his person, amounting to a considerable sum. This, or a part of it, however, he recovered early in the morning on the 29th. According to defendant's story, they were to take a train for Wyoming on that morning. Wagner is not

clear as to what he did during that day or where he spent the following night. He states that the arrangement was that they were to take the train together on the morning of the 30th. The fact is that either on the morning of the 29th or 30th the defendant left Billings and went to Wyoming, but not to Worland, the place agreed upon. He did not open a saloon. Wagner did not know where he had gone, and presumably did not see him again until he was arrested upon the charge preferred in the indictment. The defendant admitted that he had received $150 from Wagner. He denied that he received any other sum, and stated that during their carouse on the evening of the 28th he had returned to Wagner $100 of the amount received. Wagner denied this.

Counsel earnestly contend that these facts show conclusively that the negotiations between Wagner and the defendant resulted in the formation of a partnership, and that, since one partner cannot commit larceny by taking and appropriating to his own use the property or moneys belonging to the partnership, the court erred in not directing the jury to acquit the defendant, and also in not granting him a new trial on the ground that from no point of view can a conviction for larceny be sustained. Under the statute (section 8642, *supra*) one cannot be convicted of larceny except upon the taking of the personal property of another as therein declared. A partner cannot commit larceny of the funds or property of the partnership of which he is a member, because the interest or ownership of such partner extends to every portion of its property. (Revised Codes, sec. 5469.) Each partner combines in himself at once the character of principal and agent, and may possess and dispose of the firm's funds and property, even to the extent of appropriating them to his own use, by withdrawing them from the common fund. But a distinction must be made between an agreement to form a partnership and the consummation of the agreement. On this subject Mr. Parsons says: "There must be a lawful and valid agreement to enter into partnership, and this contract must be executed; and therefore courts do not declare persons to be partners under an agreement for a

partnership without proof that some joint transactions have been undertaken in accordance with it, or some joint benefit received." (Parsons on Contracts, sec. 6.) Again, the same author says: "If the agreement of copartnership is executory and conditional, no partnership is created by it until all the conditions are fulfilled." (Section 12.)

The question whether or not a partnership has in fact been created has most frequently arisen in cases where one is sought to be charged by a third person as a partner, as in *Atkins* v. *Hunt*, 14 N. H. 208; but the distinction pointed out by Mr. Parsons is generally recognized by the courts, whether in this class of controversies or those in which the rights of the parties *inter sese* are involved. (*Hanrahan* v. *Freeman*, 35 Mont. 584, 90 Pac. 793; *Hayhoe* v. *Burge*, 9 Q. B. 431; *Howell* v. *Brodie*, 37 Q. B. 499; *Wilson* v. *Campbell*, 5 Gilm. (Ill.) 383; *Goddard* v. *Pratt*, 16 Pick. (Mass.) 412; *Rice* v. *Shuman*, 43 Pa. 37.) In *Wilson* v. *Campbell*, *supra*, the court observed: "A mere agreement to form a partnership does not in itself create a partnership. The parties must enter on the execution of the agreement before the relation of partners exists between them. While the agreement remains executory, if one of them refuses to carry it into effect, the only remedy of the other is by an action at law for the violation of the agreement or by a bill in equity to enforce specifically its performance."

Under the facts of this case, we are of the opinion that, while there was an agreement to form a partnership, the agreement was never executed so far as to entitle the defendant to claim any interest in the sums of money paid him by Wagner. Wagner had no knowledge of, or experience in, the business, and naturally, after informing himself as to the experience and qualifications of the defendant, intrusted him with the different amounts paid him for the purpose of putting the agreement into execution. For the time being, and until this had been accomplished, the defendant having done his part, he was merely the bailee of Wagner, and had no other interest. Having failed to perform his part, and by his behavior in this regard repudiated the agreement, he could not appropriate the funds to his

own use under the claim that he was a partner. He could not make a defense to an action at law by Wagner to recover the amount of money received for his use and benefit, nor would he be in position to resist an action for damages for failure to carry out his agreement. Any other conclusion could not find support on any just principle. *Napoleon* v. *State*, 3 Tex. App. 522, is a case directly in point, both in fact and principle. The defendant was charged with embezzlement, and made the contention that, being a partner of the prosecuting witness, he could not be convicted. The court overruled him, and on appeal the judgment was sustained, on the ground that, though a partnership agreement had been made, it had never been consummated, and hence that the defendant could not claim immunity on the ground that he was a partner.

4. Of the several assignments questioning the action of the court in its rulings upon the evidence, only one requires notice. On cross-examination the prosecuting witness was asked: "Q. You spent how much money that night for liquors?" The time referred to was the evening of March 28. Upon objection by the county attorney, the witness was not permitted to answer. Thereupon counsel made an offer to prove the following: That the prosecuting witness on the evening mentioned went with defendant to various drinking places and brothels; that he there spent his money for beer and wine; that, having spent all he had, he called upon defendant for $100; that he claimed that he had been robbed, but afterward recovered a considerable sum from one of the inmates of a brothel; and that he was so intoxicated that he could not remember the incidents of the evening. This offer was also rejected. The theory of counsel evidently was that the defendant had received only $150, as he subsequently stated, and that, if it could be shown that he had returned $100 of this amount, he could not in any event be held guilty of grand larceny. It was competent to ascertain the amounts spent by the witness as tending to show that he had exhausted his funds, and that the necessity had arisen to call on the defendant to supply him, thus giving support to counsel's theory of the case. It will be observed,

however, that the offer did not refer to any specific sum or sums at all, but only to the general result of the evening's debauch, and therefore did not include the evidence apparently called for by the inquiry. Upon further cross-examination, it was made to appear that the witness between his expenditures and the theft perpetrated upon him during the evening or night had gotten rid of all the money he had with him. He was also fully questioned without objection, as to his intoxication and the amounts, if any, he had received back from the defendant. He denied flatly that he was intoxicated, as also that he received any money from the defendant. While the ruling was erroneous in excluding the evidence called for, in view of the fact that all the evidence included in the offer, so far as it could be ascertained from the witness, was afterward admitted, it seems clear that no prejudice was done by it. The defendant gave his version of the story, but did not undertake to state specific amounts further than to say that he had upon request returned to the prosecuting witness $40 at one time and $60 at another; the reason for the request being that the defendant did not care to show other persons present the money he had with him. If we presume, as we must, that the only evidence sought by the question was that included in the offer to prove, it is obvious that the ruling did not result in prejudice.

On the whole, we think that the defendant was not prejudiced by any ruling during the trial, and that the judgment and order should be affirmed. It is so ordered.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

Rehearing denied March 10, 1909.

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STATE, RESPONDENT, v. ROSS, APPELLANT.

(No. 2,605.)

(Submitted December 23, 1908. Decided February 15, 1909.)

[99 Pac. 1056.]

Criminal Law —Gaming — Statute — Constitutionality—Title—Unity of Subject—Penalties—Civil Action for Money Lost—Information—Sufficiency.

Statutes—Title—Validity.

1. That the title of an Act recites the purpose of the legislation at a greater length than necessary is not a valid objection to either the title or the Act.

Same—Single Object—How Determined—Surplusage.

2. The question whether a particular Act has but a single object or purpose in view must be determined, not from the title, but from the body of the Act itself; and, if it has but one, the legislation is not invalid on the ground of plurality of subjects even though the title recites more than one; the subject not contained in the Act being treated as surplusage.

Gaming—Statute—Constitutionality.

3. *Held*, that the Act of 1907 prohibiting certain forms of gambling (Laws 1907, p. 287 [secs. 8416-8436, Revised Codes]) is not open to the constitutional objection (Article V, sec. 23) that it contains more than one subject.

Same—Penalties—Civil Action for Money Lost—Validity of Statute.

4. The anti-gambling law (Laws 1907, p. 287 [Revised Codes, secs. 8416-8436]) was not rendered invalid by the insertion of section 15 (sec. 8430, Revised Codes), creating a right of action in favor of one losing at any of the prohibited games, to recover the amount lost together with exemplary damages. The right thus given is in the nature of a penalty and constitutes a part of the penalty provided by the Act. The only limit placed by the Constitution upon the legislature in fixing punishments for crimes is that no excessive fines be imposed or cruel and unusual punishments inflicted.

Same—Information—Sufficiency.

5. An information charging a violation of the anti-gambling law in the words of the statute (sec. 1, Act of 1907, p. 287 [sec. 8416, Revised Codes]) viz.: that defendant willfully, etc., "did open, carry on * * * a certain game of stud-horse poker for money," etc., was sufficient, and it was not necessary to describe the game in detail or set out the means by which it was carried on.

Appeal from District Court, Yellowstone County; Sydney Fox, Judge.

JOHN ROSS was convicted of a violation of the anti-gambling law, and appeals. Affirmed.

Mr. Jesse B. Roote, for Appellant.

The information does not charge that the game was played for money, checks and credits, but that the appellant conducted it for moneys, checks and credits. It may be that those who were engaged in the game were playing for amusement, and paid the appellant a fixed sum, in no way dependent upon the result of the game, for conducting it. This might be within the allegations of the information, but it would not be a public offense or within the statute. (*People* v. *Carroll,* 80 Cal. 153, 22 Pac. 129; *Dreyfus* v. *State,* 83 Ala. 54, 3 South. 430; *State* v. *Stillwell,* 16 Kan. 24; *Meyers* v. *State,* 41 Tex. Cr. 508, 55 S. W. 818; *Rawls* v. *State,* 70 Miss. 739, 12 South. 584; *Cothran* v. *State,* 36 Tex. Cr. 196, 36 S. W. 273.)

The Act in question violates section 23, Article V, of the Constitution, providing that no law shall be passed containing more than one subject, which shall be clearly expressed in its title. (*People* v. *Denahy,* 20 Mich. 349; *Skinner* v. *Wilhelm,* 63 Mich. 568, 30 N. W. 311; *State* v. *Ferguson,* 104 La. 249, 81 Am. St. Rep. 123, 28 South. 917; *Builders' etc. Supply Co.* v. *Lucas,* 119 Ala. 202, 24 South. 416; *State* v. *Wright,* 14 Or. 365, 12 Pac. 708; *City of Grand Rapids* v. *Burlingame,* 93 Mich. 469, 53 N. W. 620; *Oxnard etc. Sugar Co.* v. *State,* 73 Neb. 57, 102 N. W. 80, 105 N. W. 716; *Equitable etc. Co.* v. *Donahoe,* 3 Penne. 191, 49 Atl. 372; *Christie* v. *Miller,* 128 Ga. 412, 57 S. E. 697.) Furthermore, a criminal statute cannot contain provisions of a civil nature. (*State* v. *Tieman,* 32 Wash. 294, 98 Am. St. Rep. 854, 73 Pac. 375.)

Mr. Albert J. Galen, Attorney General, and *Mr. W. H. Poorman,* Assistant Attorney General, for Respondent.

The gravamen of the information is that defendant did open, carry on, operate, run and conduct a game of stud-horse poker for gain. (*State* v. *Wilson,* 9 Wash. 16, 36 Pac. 967; *State* v. *Preston* (Wash.), 95 Pac. 82.) The manner of doing this, whether by playing or otherwise, or by use of cards or other device, is wholly immaterial so far as the pleading is concerned,

for it is positively prohibited in any and all forms. Such matters may be material as evidence, but not as pleading. Charging a statutory offense in the language of the statute is sufficient. (*State* v. *Swan*, 31 Utah, 336, 88 Pac. 12; *State* v. *Stickney*, 29 Mont. 523, 75 Pac. 201; *State* v. *Carr*, 6 Or. 133.) The game charged to have been conducted is given a specific name, and the use of that name is a sufficient description. (*State* v. *Wilson*, 19 Wash. 16, 36 Pac. 967; see, also, *Bobel* v. *People*, 173 Ill. 19, 64 Am. St. Rep. 64, 50 N. E. 322; *State* v. *Carr*, 6 Or. 133.) The Act is not open to the constitutional objection made by appellant. (*State* v. *McKinney*, 29 Mont. 375, 74 Pac. 1095; *City of Crookston* v. *County Commissioners*, 79 Minn. 283, 79 Am. St. Rep. 453, and note, 82 N. W. 586; *Bobel* v. *People*, *supra*, and note.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

An information was filed in the district court of Yellowstone county charging that the defendant, John Ross, "willfully, wrongfully, and unlawfully did open, carry on, operate, run, and conduct a certain game of stud-horse poker for money, checks, and credits with certain persons whose names are to this informant unknown," etc. The defendant, having been convicted, appeals from the judgment. It is claimed by the appellant that the statute under which the prosecution was had (Laws 1907, Chapter 115, p. 287) is unconstitutional, and that the information does not state a public offense in any event.

1. It is said that this Act contains more than one subject; that the title of the Act fairly expresses the purposes of the Act, which are: "First, to prohibit certain games and the possession and use of certain implements and appliances and the using or leasing of any premises for gambling purposes, and to provide for the enforcement of the Act; second, to provide civil and criminal liabilities and penalties for violations of its provisions; third, to provide for civil actions for the recovery of money lost at any of the games prohibited by the

Act; and, fourth, to repeal and prohibit city and town ordinances on the subject"—and is violative of section 23, Article V, of the Constitution of Montana, which provides: "No bill, except general appropriation bills, and bills for the codification and general revision of the laws, shall be passed containing more than one subject which shall be clearly expressed in its title. * * * "

It is perfectly clear from the title of the Act, and from the body of the Act itself, that the purpose to be accomplished by the legislation is to prohibit certain forms of gambling and to punish everyone who engages, directly or indirectly, in any of the prohibited games, whether as a player, a person betting on the side, the owner or person in charge of the place where the prohibited games are conducted or where the paraphernalia are kept, or any person who solicits another to visit a place where any such gambling is conducted or represented to be conducted. The title of the Act might have been abbreviated, but the fact that it recites the purposes at greater length than necessary is not a valid objection to it or to the Act. In *Evers* v. *Hudson*, 36 Mont. 135, 92 Pac. 462, this court, in considering a like objection to a statute, said: "The object of the constitutional provision now under consideration is not to embarrass honest legislation, but to prevent the vicious practice, which prevailed in states which did not have such inhibitions, of joining in one Act incongruous and unrelated matters. The rule of interpretation now quite generally adopted is that, if all parts of the statute have a natural connection and can reasonably be said to relate, directly or indirectly, to one general and legitimate subject of legislation, the Act is not open to the charge that it violates this constitutional provision; and this is true no matter how extensively or minutely it deals with the details looking to the accomplishment of the main legislative purpose. (26 Am. & Eng. Ency. of Law, 2d ed., 575.) Or, stating the converse of the proposition, it may be said that if, after giving the Act the benefit of all reasonable doubts, it is apparent that two or more independent and incongruous subjects are embraced in its provisions, the Act will be held to transgress the constitu-

tional provision, and to be void by reason thereof." The title of an Act may be as comprehensive as the legislative judgment dictates, provided only that it looks to but a single purpose or object, and the Act may include every matter germane to, and in furtherance of, that purpose or object.

The provision of our Constitution quoted above is one found in the Constitution of nearly every state, and it has come to be treated by courts and text-writers generally as referring to "unity of subject." In speaking of this provision the writer of the text in 26 American and English Encyclopedia of Law, 575, says: "In fact, however, the question of 'unity of subject' must be determined, not from the title, but from an inspection of the body of the Act, and if that be found to embrace but one subject, the fact that the title expresses more than one does not render the Act objectionable on the ground of plurality; the subject not contained in the Act being treated as surplusage."

We think that a careful perusal of this Act will disclose that it has but a single purpose, viz., to prohibit certain forms of gambling. In providing penalties the Act is very sweeping in its provisions, but reference to the penalty clauses need not have been included in the title at all, and the omission would not have vitiated the Act. (*State* v. *Bernheim*, 19 Mont. 512, 49 Pac. 441; 26 Am. & Eng. Ency. of Law, 588.)

In addition to the penalties, strictly so called, this Act provides that a person losing at any of the prohibited games may maintain a civil action to recover the amount lost, together with exemplary damages, which in no case shall be less than $50 nor more than $500. But it is contended that a criminal statute cannot contain a provision for a civil remedy, and *State* v. *Tieman*, 32 Wash. 294, 98 Am. St. Rep. 854, 73 Pac. 375, is referred to in support of this contention; but the case is not authority for the proposition in support of which it is cited. The statute of Washington under consideration provided for proceedings in bastardy, which the court held to be civil proceedings, and since the statute was a part of an Act entitled "An Act relative to crimes and punishments and proceedings in criminal cases," it was held that the bastardy statute was not

comprehended in the title. We do not know of any provision of the Constitution which limits the legislature in fixing punishments for crimes, except that which forbids that excessive fines be imposed or cruel or unusual punishments inflicted.

Section 15 of this Act creates a right of action in favor of one losing at any of the prohibited games. The obvious purpose of this section is to rob gambling of its fascination by depriving the winner of the fruits of his wager, but the section does not stop there. The winner is not only liable to lose his winnings, but is equally liable to be mulcted in damages from $50 to $500; and the winner is not the only one who is made liable, but "all persons having any interest, direct or contingent, in such game as backers, owners or otherwise," are equally liable with the winner. In other words, the right of action given by section 15 is in the nature of a penalty, and in fact constitutes a part of the penalty provided by the Act. In 1876 the state of Oregon adopted a statute very similar to our chapter 115, above. Section 3 of that Act (Laws 1876, p. 40) gives to the loser a right of action to recover double the amount lost. (Hill's Ann. Laws Or. 1892, c. 45, secs. 3526-3536.) In *Meyers* v. *Dillon,* 39 Or. 584, 66 Pac. 814, the court, speaking of this provision, said: "Again, it is insisted that the court erred in stating to the jury the general provisions of the Act of 1876 defining unlawful gaming, and the penalties for a violation thereof. The section of the statute under which the present action was instituted (Hill's Ann. Laws Or., sec. 3528) is a part of the Act referred to, and is intelligible only by reference to the other provisions. It particularly refers to the unlawful gaming defined and punished by other sections, and is, in effect, one of the penalties for the violation of the Act. It creates a cause of action in favor of the loser of money at certain gambling games against the dealer or player winning the same, or the proprietor of such game, to recover double the amount lost."

Section 5209, Revised Statutes of Missouri, 1889, provides: "Any person who shall lose any money or property at any game or gambling device, may recover the same by civil action." In considering this statute the court, in *Cofer* v. *Rise-*

ling, 153 Mo. 633, 55 S. W. 235, said: "As was well said in *Howell* v. *Stewart,* 54 Mo. 406, quoting from Lord Mansfield in reference to lottery statutes: 'The statute itself * * * has marked the criminal.' This statute was intended as an aid to the criminal statute. It is leveled against the winner. The criminal statutes deal criminally with the loser. The statute was intended to prevent gambling by taking away the fruits of the wager from the winner. The right is therefore purely statutory. The statute is an exercise of the police power of the state and as such is constitutional. The rights and the remedies must be found in the statute itself." We do not think that the objections urged against the statute are valid.

2. Against the sufficiency of the information it is urged that "the information does not charge that the game was played for money, checks, and credits, but that the appellant conducted it for money, checks, and credits." In so far as applicable here, section 1 of Chapter 115, above, reads as follows: "Any person who * * * conducts * * * any game of * * * stud-horse poker * * * for money, checks, credits or any representative of value * * * is punishable by a fine not less than one hundred nor more than one thousand dollars, and may be imprisoned," etc. While the language of section 1 is somewhat involved, we think that, in so far as applicable here, it is properly paraphrased above. The information follows the language of the statute, and in this instance is sufficient. The statute in terms prohibits anyone from conducting the game of stud-horse poker for money, checks, credits, or any representative of value. In 20 Cyc. 903, the general rule applicable to a case of this character is stated as follows: "Where the playing of a game is in express terms prohibited by the statute, the general rule is that a statement of the name of such prohibited game in the indictment is sufficient, and that it is not necessary to give any description of the game in detail or the means by which the same is played"—and many cases are cited in support of the text. With this rule we agree.

It was not necessary for this Act to provide for a repeal of city and town ordinances. It would have that effect in any event.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

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STATE, RESPONDENT, v. ROSS, APPELLANT.

(No. 2,611.)

(Submitted December 23, 1908. Decided February 15, 1909.]

[99 Pac. 1058.]

[For syllabus, see State v. Ross, *ante*, p. 319.]

Appeal from District Court, Yellowstone County; Sydney Fox, Judge.

JOHN ROSS was convicted of conducting a gambling game, and he appeals. Affirmed.

Mr. Jesse B. Roote, for Appellant.

Mr. Albert J. Galen, Attorney General, and *Mr. W. H. Poorman*, Assistant Attorney General, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The defendant was convicted of conducting a gambling game and appeals from the judgment. The facts are practically the same as in the case of *State* v. *Ross, ante*, p. 319, 99 Pac. 1056, and this appeal was submitted upon the briefs in that case.

For the reasons stated in *State* v. *Ross*, above, the judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

STATE, RESPONDENT, v. NORDALL, APPELLANT.

(No. 2,651.)

(Submitted December 24, 1908. Decided February 15, 1909.)

[99 Pac. 960.]

Criminal Law—Homicide—Corpus Delicti—Proof—Evidence—Admissibility—Exhibits—Exclusion—Remarks of Court.

Homicide—*Corpus Delicti*—Proof.

1. In a prosecution for murder, the only fact required to be proved directly, under section 8298, Revised Codes, is the death of the person alleged to have been killed, and not the identity of the deceased or the fact that the killing was done by the defendant.

Same—Circumstantial Evidence—Admissibility.

2. Where the state relied on circumstantial evidence to convict the defendant of murder, everything found in and about the burned ruins of the cabin in which a family of five was found dead, which tended to enlighten the jury and enable them to determine the ultimate question of the guilt or innocence of the defendant, was properly admitted in evidence.

Same—Exhibits—Exclusion—Remarks of Court—Prejudice.

3. The murder with which defendant was charged was committed in January. After the crime evidences of coal-oil were found on defendant's overalls and overshoes. On the trial witnesses for the defendant testified as to experiments made by them at the time of the trial (in June) by pouring coal-oil on overalls and overshoes, but no attempt was made to show what, if any, effect the difference in temperature and atmospheric conditions would have upon the tendency of oil to soak into substances or evaporate. When the articles with which the experiments had been made were offered in evidence, the court rejected them with the remark that, without showing such conditions, the experiments were worthless. Afterward, however, the court offered to allow the articles to go in evidence, provided defendant's counsel would put an analytical chemist on the stand to testify to the effect of temperature on evaporation of coal oil. This offer was declined. *Held*, that under the circumstances prejudicial error was not committed, either in rejecting the exhibits or in making the remark that without such showing the evidence offered was worthless.

Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

OLE NORDALL was convicted of murder in the first degree, and from the judgment and from an order denying a new trial, he appeals. Affirmed.

STATEMENT OF THE CASE, BY THE JUSTICE DELIVERING THE OPINION.

There are two appeals in this case,—one from a judgment of conviction of murder in the first degree, and one from an order of the district court of Fergus county denying the defendant's motion for a new trial.

The following statement of facts, taken from the brief of counsel for the defendant, will probably do him no injustice:

The defendant and a family by the name of Schluter, the members of which consisted, at the time of the alleged offense, of a mother and four children, lived near the Musselshell river in Fergus county, about two miles apart, and had been, according to the testimony of the defendant, close friends ever since the Schluter family, including the father, who died about the 5th of December, 1907, arrived in that part of the country some four years previous. The defendant during his residence there had been engaged in the cattle business, for two or three years past had rented winter pasture from the Schluters, and, when his cattle were up there, was in the habit of going up every day. During his acquaintance with the family he had performed many kindly acts for them, and when the father died he contributed to a fund of $100 raised by the neighbors for the destitute family, the sum of $25. Sometime in the month of December the defendant, on account of shortage of feed, took his cattle from the Schluter field and to the hills back of his own ranch, holding his own fields for bad weather, and daily riding to hold his cattle together. Nearly every day he had occasion to ride in the direction of the Schluter ranch to turn back his cattle, and he testified that he had not been there for a week

or ten days before the fire hereinafter referred to. On Thursday evening, about 12 o'clock, a stranger named Mullinbrook, who was not sworn at the trial, and who was staying at the ranch of a Mr. Anderson, the Schluter's nearest neighbor, a distance of about three-quarters of a mile away, discovered that the Schluter buildings were on fire, and, upon going with Mr. and Mrs. Anderson to the Schluter ranch, which they did at once, found that the house was almost entirely consumed. They called aloud, and receiving no response, made up their minds that the family had probably gone to Anderson's by another road, and upon their return home, not finding them there, concluded that they must have gone to some other neighbors. The next morning at about 8 o'clock they went again to the Schluter ranch, at that time saw what they took to be a portion of an arm of a human being protruding from the ruins. They found at that time certain footprints made by some one wearing overshoes, which tracks led from the house to a storehouse a short distance away, back again to the house, and to the river. Witness Anderson, who first saw these tracks, noticed nothing peculiar about them at that time. He immediately rode up the river advising Mr. Harding of the fire. It does not appear that any person noticed anything peculiar about these tracks until the Tuesday following, when the inquest was held, and after the county attorney had placed a pair of left overshoes belonging to the defendant in the tracks. Saturday morning W. C. Niles, a witness for the state, with other witnesses, made an examination of the overshoe tracks, and while he thought there was something peculiar in their looks, he did not have the idea that they were made by two left overshoes, nor indeed did he at any time draw this conclusion. A number of neighbors arrived at the scene of the fire on Saturday, and the witnesses Harding and Niles measured the overshoe tracks, marking the length and width upon sticks, which, however, were not produced at the inquest or on the trial, but were lost or mislaid by the witness Harding, who was told by the county attorney that it was not necessary to keep them.

The defendant, who lived about two miles from the Schluters and where the ranch of the Schluters cannot be seen from his place, was first advised of the fire by his nearest neighbor, Mr. Bart, on the evening of Sunday, the 19th. He at first appeared to think it was a joke being played upon him by Mr. Bart, and expressed surprise at the news, but on discovering that it was a fact, stated his intention to go to the inquest, supposed to be held the next day. He did so, and remained there with neighbors nearly all day, and returned to his home that evening, accompanied by the witness Fallon and one Nordquist, who remained with him that evening, and the next day they returned to the scene of the fire, and on the arrival of the coroner that afternoon an inquest was held. The defendant assisted in digging out of the ruins what were afterward identified by the coroner as parts of human bodies, and was asked by the sheriff to be one of the coroner's jury. The defendant testified that he had no idea that he was suspected of any offense. He did not, however, act as a juror, as he was not summoned, but was afterward called before the jury and sworn as a witness. After being warned by the county attorney that he did not have to submit to measurements of his feet unless he wished, he permitted them to measure his shoes, telling them the size of the overshoes he wore; and, after being again advised that he need not agree to it unless he wished, he was asked if he had any objections to their sending for the overshoes, and replied that he had not, and told where they could be found. The witness Lugo. who was sent for the shoes, found them in the place indicated, and upon their being brought defendant admitted that they were his overshoes. An examination disclosed that there was frozen blood on the bottom of them, in the hollow between the heel and the sole, and that a human hair was attached to the shoe, glued on by blood. The house in which the defendant lived consisted of two rooms and a storehouse adjoining, which was a separate building with a separate entrance. The overshoes were found on the floor, in open view near the kitchen stove. There was no lock upon the door of the house, and never had

been, the fastening consisting of a strap over a nail. The door on the storehouse was fastened by a hasp and staple and a Yale lock, but the staple was broken through the center, and the defendant was in the habit of unfastening it by simply "wiggling" it through the break in the staple. There was a window in this storeroom, which was set in from the outside and secured by nails which could be easily turned back and the window removed.

At the conclusion of the inquest the defendant was placed under arrest, and at his request Mr. Bart rode his horse home and stayed at his house, looking after his cattle, until some time in the following spring. The saddle ridden at that time by defendant, and which was the only serviceable one he had, was, as soon as counsel was retained by the defendant, brought to the county seat, sealed up, and the seals broken in court at the time of the trial. There were no marks of coal-oil on the leather, nor were there any marks of blood upon his stirrups. The evening of the defendant's arrest he was taken to the house of Mr. Harding, and the sheriff requested the witness Niles to examine the defendant's house for further evidence. This was done, and a pair of overalls and a blood-stained hat, rolled up and pushed down behind a trunk in the storeroom, were found, and in a cupboard in the storeroom, among other dirty clothes, a blood-stained pair of drawers. There was also coal-oil on the overalls and on the drawers. At the same time these articles were found there was also found a blouse with blood on it, and a pair of suspenders with blood thereon; also a shirt with blood spattered on it, and another clean shirt with some red substance on the cuff. The defendant testified that he had not worn the hat for several months, except once, when he killed a beef, some time in December, 1907. He testified that he had not worn the suspenders for about a year and a half, and explained the blood on the overalls and hat as having been gotten on by killing animals. The presence of the hair upon the overshoe he explained by saying that he, with the assistance of Mrs. Schluter and her daughter, killed and dressed a pig at Schluter's some-

time in the month of December, probably about the middle of the month, and the blood on the overshoes was explained in the same way. As to the coal-oil found upon the overalls, the drawers, and the overshoes, the defendant said he had no knowledge of coal-oil being upon them. He stated that the last time he saw the hat, overalls, and drawers there was no coal-oil upon them, nor were any of them behind the trunk in the storeroom, but in another part of the room. The articles described as having been found behind the trunk, the pair of drawers found in the closet, and the overshoes were given to an analytical chemist, who made an examination of the blood stains, and on the trial was unable to say whether or not the blood was that of a human being or some other mammal. Defendant denied any knowledge whatever of the alleged offense, and stated that he had no knowledge of the burning of the house until apprised of it by Mr. Bart, on Sunday, the 19th of January.

Two days after the inquest the witnesses Niles, Harding and Rowton went to defendant's place, and from a field in which he kept his saddle horses, five in number, one side of the field being bounded by the river, took a horse of defendant's called "Nig" to the place where they claimed a hoof print showed on the bank of the river nearly opposite the Schluter home, and where, according to the state's theory, the assassin left his horse on the night of the fire, and compared the track of the horse Nig with that at that point. They stated that they followed this hoof print down a bridle trail in the direction of the defendant's house for a short distance, when they lost it, but that about half a mile farther on they picked it up again, and followed it still farther toward the defendant's ranch. The witness Niles, while testifying that the hoof mark was peculiarly shaped, could not say that other horses in that part of the country would not make similar tracks. The marks of reins dragging on the dust were found at the place where the horse was supposed to have been left by the assassin, but no place was found where the horse had been tied, although inspection was made to find such a place. Testimony was introduced by the

defense to the effect that the horse Nig would not stand without being tied, any length of time. The defendant claimed to have ridden the horse Nig, at times during the week preceding the fire, after cattle up and down the river as usual, over the range, and on the same bridle trail where these marks were stated to have been found by the witnesses. The horse, when taken by these witnesses from the pasture, seven days after the fire, showed sweat marks. At the time the bodies were taken from the ruins it was found that four of them were lying in their beds in their accustomed places along the wall, but that a fifth body, identified from the pelvic bones by the coroner as that of an adult female, was found near the door lying upon the side of the ridge pole, which had fallen between her and the other bodies, precipitating the dirt roof to the floor. In the extreme corner of the room lay another adult female body, on the bed and springs occupied and used by Bertha Schluter, the mother, for the killing of whom the defendant was convicted. Three guns, comprising a 22-rifle, a 35-70 Winchester, and a shotgun, or rather the barrels of these guns, were found in the place where they were usually kept, in the sleeping-room occupied by the Schluter family. The coroner, Dr. Attix, distinctly stated that he discovered no marks of violence upon any of the bodies, and that it was impossible for any person to do so, for the reason that they were all practically consumed by the fire, only a few bones which could be identified as human bones remaining. The defendant had lived in Montana for the past eighteen years, and has never been arrested for any offense.

In addition to the foregoing, testimony was produced to the following effect: That the Schluter family, consisting of Bertha Schluter, Martha Schluter, her eldest daughter, a girl of about fourteen years of age, and three younger children, were seen at their home on the afternoon preceding the fire, which took place on the night of the 16th of January, 1908. They have never since been seen. They were in reasonably good health the day before the fire. The family owned a shepherd dog, which was never allowed to be in the house, and the bones of the head of

a dog were found in the ruins after the fire. The Schluters had a can of coal-oil in their storehouse prior to the fire, and on the morning after the fire two battered coal-oil cans were found in the ruins, and the witnesses discovered that the storehouse door was open, and a strap, with which it was usually fastened, was broken from the door and hung on a nail in the door jamb. The state produced testimony to the effect that the horse Nig would stand without being tied; also to the effect that there were spots which looked like blood on the defendant's saddle and rope. The $25 check testified to by the defendant was not produced at the trial, although it was drawn on a bank at the county seat; but the defendant produced his check-book showing a stub which he said belonged to the check. The state's witnesses testified that during the investigation the defendant appeared very nervous, and that he bore on his face and one of his hands many scratches that appeared to be made by finger nails. The defendant explained these marks by saying that one of his horses had "bucked" with him into the brush, and that he received the scratches in this manner. Witnesses also testified that defendant's mustache and eyebrows were badly singed when they first noticed him after the fire, and that his neck appeared to be scorched on one side. He explained this by saying that he had burned some old fences about the 10th of January. This latter testimony, however, was somewhat contradicted by a witness, who said that he saw the defendant burning the old fences, and that the fire was not nearly as large as the defendant testified it was, and that after having started it, the defendant went to plowing, and did not go back to the fire until it was nearly out. The defendant also testified that his mustache was badly scorched in December by the flame of a stove, and that he was about the open fire at the Schluter house, but he did not undertake to say positively that the condition of his mustache and eyebrows after the fire was attributable to any of these experiences. In fact he said that he did not know anything about his mustache and eyebrows being burned at the time of the inquest, until they asked him about it. The foot-

prints about the Schluter cabin, and down to the river bank, where the horse had apparently been tied, were all made by two left overshoes, and the defendant's overshoes were both lefts. Diamond-shaped indentations were found in the tracks, similar to those in the soles of the overshoes. Witnesses testified that Mrs. Schluter appeared to be afraid of the defendant, and did not want him around the house at all; that the defendant had stated that he had poked Martha in the ribs, and he expected that they would have him arrested for it; also that the defendant had taken his cattle out of the Schluter field, and had stated that he had told them that he had befriended them, but that it seemed as though his efforts were not appreciated, and he guessed the best thing he could do would be to go away and not go to their house in the future. The hair on the defendant's overshoe was about the color of Martha's hair, and there was bright red blood on the overalls found with the hat. The coroner, who was a physician, testified that the bodies appeared to have been subjected to a "terrific" amount of heat. The defendant killed a pig for Mrs. Schluter about the 10th of December, and a beef two or three weeks after that date. He also butchered a pig on January 5, but the witness who assisted him testified that he did not think defendant got any blood on his clothing at that time, except a little on the cuff of his shirt.

Mr. J. C. Huntoon, and *Mr. O. W. Belden*, for Appellant.

The main point in this appeal is that there is an entire absence of the proof necessary to establish the *corpus delicti*. In *State* v. *Pepo*, 23 Mont. 473, 59 Pac. 721, and *State* v. *Calder*, 23 Mont. 504, 59 Pac. 903, as we understand the opinions, it was held that in order to satisfy section 8298, Revised Codes, there must be direct proof of the death, caused by criminal means, of the person alleged to have been killed.

The chief fact to be proved in the case at bar, and the fact upon which the case for the state rested entirely, was: Did Bertha Schluter come to her death by criminal means? If that

is not proved by direct evidence, as we look at it, there is no case established. There was no attempt even, to prove that she came to her death by violence inflicted by any person—that is any direct proof of that fact. Independent of our statute, it has always been the rule of law, that there must be some proof that a death was caused by violence inflicted by another, under circumstances rendering the infliction of that violence criminal, before there can be a conviction, and failure to prove by what means the deceased came to his death is fatal to a conviction. (*Cole* v. *State*, 59 Ark. 50, 26 S. W. 377; *Conde* v. *State*, 35 Tex. Cr. 98, 60 Am. St. Rep. 22, 34 S. W. 286; *People* v. *Callego*, 133 Cal. 295, 65 Pac. 572; *Herren* v. *People*, 28 Colo. 23, 62 Pac. 833; *Ruloff* v. *People*, 18 N. Y. 179; *People* v. *Bennett*, 49 N. Y. 137; *Lucas* v. *State*, 19 Tex. App. 79; *Hunter* v. *State*, 34 Tex. Cr. 599, 31 S. W. 674; *Dreessen* v. *State*, 38 Neb. 375, 56 N. W. 1024; *People* v. *Simonsen*, 107 Cal. 345, 40 Pac. 440; see, also, *People* v. *Swetland*, 77 Mich. 53, 43 N. W. 779; *People* v. *Ward*, 134 Cal. 301, 66 Pac. 372.) As to what is sufficient to justify a verdict, even under statutes not requiring direct proof, and for a full discussion of insufficiency of evidence in a case of this kind, see *State* v. *Pagano*, 7 Wash. 549, 35 Pac. 387; *People* v. *Tapia*, 131 Cal. 647, 63 Pac. 1001; *Territory* v. *Rehberg*, 6 Mont. 467, 13 Pac. 132. In the absence of proof upon a vital point it is the duty of the court to direct verdict of not guilty. (*State* v. *Welch*, 22 Mont. 92, 55 Pac. 927.)

Remarks of the court are frequently considered by the jury as having much more weight than the arguments of counsel; and when the court says that a piece of evidence offered is entitled to no weight, because of certain reasons he points out, he is commenting on what weight they should attach to it, and in effect telling them what his opinion of it is, and they generally follow his remarks. This is error. (*Singer Mfg. Co.* v. *Greenleaf*, 100 Ala. 272, 14 South. 109; *Deshler* v. *Beers*, 32 Ill. 368, 83 Am. Dec. 274; *West* v. *Black*, 65 Ga. 647; *Brunker* v. *Cummins*, 133 Ind. 443, 32 N. E. 732; *McKissick* v. *Ore. Short Line*,

13 Idaho, 195, 89 Pac. 629; *State* v. *Shuff*, 9 Idaho, 115, 72 Pac. 664; *Kroetch* v. *Empire Mill Co.*, 9 Idaho, 277, 74 Pac. 868.)

Mr. Albert J. Galen, Attorney General, and *Mr. E. M. Hall*, Assistant Attorney General, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

It is contended by the appellant that there is in the record an entire absence of proof necessary to establish the *corpus delicti*. Section 8298, Rev. Codes, is relied on. It reads as follows: "No person can be convicted of murder or manslaughter unless the death of the person, alleged to have been killed, and the fact of the killing by the defendant as alleged, are established as independent acts; the former by direct proof and the latter beyond a reasonable doubt." The position of counsel is thus stated in their brief: "The chief fact to be proved in the case at bar, and the fact upon which the case for the state rested entirely, was, 'Did Bertha Schluter come to her death by criminal means?' If that is not proven by direct evidence, there is no case established." The first case cited in support of this contention is *State* v. *Pepo*, 23 Mont. 473, 59 Pac. 721. The main question considered in that case was whether the identity of the deceased must be established by direct proof. It was held that the law does not require direct proof of the identity of the victim, but only of death. The court then proceeds to say, commenting upon the opinion of Judge Finch, in *People* v. *Palmer*, 109 N. Y. 110, 4 Am. St. Rep. 423, 16 N. E. 529: "It is made clear by the learned opinion of Judge Finch that the *corpus delicti* means the existence of a criminal fact. That such a fact exists is directly proved when a dead body is found under circumstances such as were brought out on the trial of this case. But by requiring the *corpus delicti* to be established by direct proof the law does not include the identity of the murdered man, but leaves that open to indirect or circumstantial evidence, to be established on the trial." It will be observed that the court held that the *corpus delicti* or the existence of the

criminal fact was directly proved in the *Pepo Case*. In the next sentence, however, the court inadvertently used the expression "*corpus delicti*" in such a way as to indicate that all of the elements going to make up the existence of the criminal fact must be established by direct proof. The reason undoubtedly was that that was not the precise point under consideration. For the statute does not say so. The statute says that the death of the person alleged to have been killed must be established by direct proof. And the court was in reality not unmindful of this, because it quoted with approval the words of Judge Finch, as follows: "The requirement of the Code goes upon the assumption that the identity of the deceased, either by name or description, has been established in the ordinary way, and then requires that the death of that person thus identified shall be directly proved, and the killing by the prisoner of the same person shall be shown beyond a reasonable doubt." This court recognized the rule in *State* v. *Calder*, 23 Mont. 504, 59 Pac. 903, where Mr. Justice Pigott said: "The true meaning of the statute in this respect is that in the proof of the *corpus delicti* there must be direct evidence establishing the death of a person. The fact that the decedent is the person alleged to have been killed may be proved by circumstantial evidence—that is, by inferences drawn from the facts proved—or it may, of course, be established by direct proof. * * * The evidence was sufficient to satisfy the requirements [of the statute] that the death of the person alleged to have been killed must be established by direct proof as a fact independent of the fact of the killing by the defendant." And again: "The *corpus delicti* is the body or substance of the offense. This means, and has always meant, the existence of the criminal fact. In prosecutions for murder proof of the *corpus delicti* involves the establishment of the fact that a murder has been committed, but includes neither the identity of the person alleged to have been killed, nor the killing by the person accused." In the *Calder Case*, therefore, the court, in effect, held that the fact that the person alleged to have been killed is dead is the only fact that need be proved by direct

evidence; and to that interpretation of the statute we adhere. And in this case the only fact necessary to be proved directly was that the person *alleged* to have been Bertha Schluter was dead. The fact that the dead body was that of Bertha Schluter and the fact of the killing by the defendant as alleged, might be, and evidently were, in the opinion of the jury established by indirect or circumstantial evidence, which was the only kind of evidence produced on those features of the case.

The trial court, over the objection of the defendant, allowed the state to prove all of the circumstances relating to what was found in and about the ruins of the Schluter home, including the fact that parts of five dead bodies were taken therefrom. No one of these bodies was identified by direct evidence. We find no error in the ruling of the court on this point. It was necessary to prove what was found, and all of the details connected therewith, in order to establish, by circumstantial evidence, "the fact of the killing by the defendant as alleged." All of these facts and circumstances served to enlighten the jury and enable them to determine the ultimate question of the guilt or innocence of the defendant. This evidence, together with other evidence, tended to establish the identity of one of the bodies as that of Bertha Schluter. The family consisted of five persons, and the bodies of five persons were found in the ruins. No one was missing.

What is said above applies equally as well to the testimony of witnesses as to the color of the hair of Martha Schluter, the eldest daughter, and the fact that the hair found on the defendant's overshoe was the same color. It also served to show that the defendant was at a place where he could get hair of that color onto his clothing.

It is also claimed that the court erred in admitting in evidence the bones of the dog, for two reasons: (1) That they were not sufficiently identified as being the bones of the Schluter dog, or as being the same bones taken from the ruins; and (2) as immaterial. We think the evidence was material, for the gen-

eral reasons above stated, and that the exhibits were sufficiently identified.

Certain witnesses, on the part of the defendant, testified to experiments made by them by pouring coal-oil on overalls and overshoes at the time of the trial in June. No attempt was made to show what effect, if any, the difference in temperature and atmospheric conditions would have upon the tendency of coal-oil to soak in or evaporate; and, when the articles with which the experiment was made were offered in evidence, the court rejected them, with the remark that without such additional showing the experiment was worthless. Afterward the court offered to allow the articles to go in evidence, provided defendant's counsel would put the analytical chemist on the stand "to testify to the effect of temperature on evaporation, in order that the jury may understand the probable or proximate effect of the different conditions existing at the time of the Schluter fire and at the time of the experiment." Counsel declined to do this. As a matter of fact, the defendant's witnesses fully stated to the jury the result of their experiments, and the complaint made is that the articles were not admitted in evidence, and the court stated that without additional testimony the experiment was worthless. We have carefully considered this assignment of error, and conclude that the court, under the circumstances, committed no prejudicial error, either in rejecting the exhibits, or in its remark. The experiments were not conducted under substantially the same conditions as had previously existed, and, as the very gist of them was to show what amount of oil would evaporate or soak in, the matter of temperature was vitally important. This is a matter of common knowledge.

The court instructed the jury that the death of the person alleged to have been killed must have been established by direct proof, and also gave the usual instructions relating to circumstantial evidence and reasonable doubt. The jury was told, in the language of the statute, that the fact of the killing by the defendant as alleged must be established to their satisfaction beyond a reasonable doubt. Some general criticisms are made

of the instructions, but mostly with reference to the contention that the felonious killing must be established by direct proof. Our attention has not been called to any reversible error in the instructions.

An examination of the entire record satisfies us that the evidence is sufficient to warrant and support the verdict, and that the defendant had a fair and impartial trial.

The order and judgment are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

POOR, ADMINISTRATOR, ET AL., APPELLANTS, *v.* MADISON RIVER POWER CO. ET AL., RESPONDENTS.

38 341
39 461

38 341
s41 237

(No. 2,627.)

(Submitted January 14, 1908. Decided February 15, 1909.)

[99 Pac. 947.]

Master and Servant — Personal Injuries — Death—Complaint—Sufficiency — Independent Contractors—Vice-principal—Fellow-servants—Electricity—Assumption of Risk—Contributory Negligence—Directed Verdict—Error.

Personal Injuries—Relation of Master and Servant—Complaint—Sufficiency.

1. Where the gravamen of the complaint in an action to recover damages from an electric power company for the death of a carpenter, employed by it to make repairs in and about its power station, was that defendant failed in its duty to use ordinary care to furnish deceased a reasonably safe place in which to work, allegations that deceased had been "employed and hired" by defendant, and was "engaged in the performance of his duty under his employment," etc., were sufficient to show that the relation of master and servant existed between defendant and deceased.

Same—Independent Contractors—Servants.

2. The superintendent of an electric power company engaged a carpenter to do certain work about the company's power station, and directed the latter to secure another workman to help him. The understanding was that they were to be paid by the hour. The officers of the company pointed out what work was required and the company furnished the materials. The general plans were those of defendant company, and the workmen submitted themselves to the control of the company and its officers in all the details

of the work. *Held*, that the carpenters were servants and not independent contractors.

Same—Vice-principal—Fellow-servants.

3. The superintendent of an electric power company in charge of its power station and of the improvements and alterations being made thereon at the time plaintiff's intestate, a carpenter, was killed by coming in contact with an uninsulated wire, was a vice-principal and not a fellow-servant.

Same—Contributory Negligence—Complaint—Sufficiency.

4. The complaint in an action to recover damages for the death of an employee of an electric power company, which alleged that decedent, a carpenter, was engaged in the performance of his duty; that he accidentally lost his footing, and in an attempt to prevent his falling, and not knowing that a wire was charged with electricity, threw his arm over it; that he was inexperienced with electric wires, did not know that the wire was charged with electricity and that the place where he was working was unsafe because of the danger of his coming in contact with wires; that defendants had knowledge of the danger and negligently failed to inform decedent thereof—sufficiently showed the latter's freedom from negligence in the doing of the act which caused his death, and a formal allegation that he was free from contributory negligence was not necessary.

Same—Extraordinary Danger—Assumption of Risk.

5. A servant does not assume the risk of extraordinary danger of which he has no knowledge or appreciation.

Same—Knowledge of Defendant—Complaint—Sufficiency.

6. The complaint mentioned in paragraph 4 above, also *held* sufficient in its statement of facts showing wherein the danger consisted, and the causal connection between the defective place and the injury, as well as that the defendants had knowledge of the efficient cause of the injury, or, by the exercise of reasonable diligence, ought to have had such knowledge.

Same—Evidence—Contributory Negligence—Insufficiency.

7. Where a carpenter accidentally slipped on a scaffolding in an electric power station, and in doing so threw his arm over a wire heavily charged with electricity, evidence held not to justify a holding that, as a matter of law, deceased was guilty of contributory negligence.

Same—Electricity—Assumption of Risk.

8. A carpenter who, while working about the power station of an electric power company, had been informed by the superintendent in charge that there was no danger in working around the electric wires, and who, on the strength of such statement, walked over and crawled up around them while engaged in his work and was subsequently killed by coming in contact with one of them, did not assume the risk of danger from the wires.

Same—Directed Verdict—Error.

9. *Held*, that the district court erred in directing a verdict in favor of defendant electric company, in an action to recover damages for the negligent killing of one of its employees.

Appeal from District Court, Gallatin County; Henry L. Myers, Judge, presiding.

ACTION by J. R. Poor, administrator of Amos R. Howerton, deceased, and others, against the Madison River Power Com-

pany and another. Judgment for defendants, and plaintiffs appeal from it and an order denying them a new trial. Reversed and remanded.

STATEMENT OF THE CASE, BY THE JUSTICE DELIVERING THE OPINION.

Those portions of the complaint in this action which are necessary to be considered in disposing of the appeal are as follows: "That on or about the twenty-third day of January, 1907, the defendant Madison River Power Company was the owner of a certain building known as its 'substation,' situated near the western limits of the city of Bozeman, county of Gallatin, state of Montana, and of all electrical apparatus, devices, appliances, and wires situated therein; that on said twenty-third day of January, 1907, and at the time of the injuries hereinafter mentioned, the said Amos R. Howerton, deceased, was employed and hired by the defendant Madison River Power Company as a carpenter for the purpose of making certain improvements and alterations within and upon the said substation building of the defendant Madison River Power Company, under the direction of the defendant A. E. Davidson, who was at said time the superintendent or foreman of the defendant Madison River Power Company, and in charge of said substation and of the improvements and alterations therein and thereon being made at said time, upon which the said Amos R. Howerton, deceased, was so employed; that the said Amos R. Howerton, deceased, was employed by the defendant Madison River Power Company by the day, and had been engaged on said work for a period of about one week prior to the said twenty-third day of January, 1907, except for several days during said period, when such work was interrupted by reason of cold weather. That on said twenty-third day of January, 1907, and at the time of the injuries hereinafter mentioned, there was within said substation building a certain brickwork rising to a height of about twelve feet from the floor of said building; that about a foot back from the edge of said brickwork, and at a height of about eighteen or twenty inches from the top edge of said brickwork,

there was a wire carrying electric current from the power plant of the defendant Madison River Power Company, situated on the Madison river, in Madison county, Montana, which said wire entered said substation at the west end thereof, and passed into said substation, and delivered electric current into certain transformer pockets encased and erected in and upon the said brickwork, which said current was therein transformed to a lower voltage, to be carried by other wires into the city of Bozeman, to supply light and power for domestic uses to consumers in said city of Bozeman; that at the said time the said wire was charged with and carrying an electric current of about 40,000 volts of electricity, and that said wire was wholly uninsulated and unprotected. That between the hours of 7 and 9 o'clock on the morning of the said twenty-third day of January, 1907, the said Amos R. Howerton, deceased, while engaged in the performance of his duty under his employment with defendant Madison River Power Company, as aforesaid, was working as a carpenter in said substation building under the direction of the said A. E. Davidson, and was engaged in constructing certain 'horses' to be used as a part of and for the purpose of erecting a staging or scaffolding to enable the said Amos R. Howerton, deceased, to make certain improvements or alterations near the roof on the inside of the said substation building at a point almost directly over and above the said brickwork and above said wire; that while so engaged, and after having constructed the said 'horses,' and placed the same in position about two or three feet distant from the said brickwork, and while engaged in placing boards or planks on top of said 'horses,' so that the same would run from one of said 'horses' to the other for the purpose of completing said staging or scaffolding, and to form a place where he might stand while engaged in making such improvements or alterations near the roof of said building, as aforesaid, and while the said Amos R. Howerton, deceased, was standing at or near the top of one of the 'horses,' and while his body was in a position almost on a level with the edge of said brickwork and close to the said wire above mentioned, the said Amos R. Howerton, deceased, accidentally lost his footing,

and in an attempt to prevent his falling from said height to the floor below, and not knowing that the same was charged with electricity, threw his right arm over the said wire, which threw his body over in such a way as to cause it to come in contact with said brickwork, thereby forming a circuit and causing the full current of electricity with which the said wire was charged to pass through the body of the said Howerton, as a result of which said electric shock the said Howerton instantly died. That the said Howerton, deceased, by reason of his inexperience with electric wires and devices, did not know that the said wire which caused his death, as aforesaid, was charged with electricity, and did not know that the said place where he was working was dangerous and unsafe because of the danger of his coming in contact with wires charged with electricity; that the defendant wrongfully and negligently failed to inform said Amos R. Howerton, deceased, that the said wire which caused his death was charged with electricity, or of the danger in which he was placed because of the fact that there were wires charged with electricity in dangerous quantity in close proximity to the place where said Howerton was working as aforesaid. That the said defendants had knowledge and notice of said conditions and of said dangers, or by the exercise of reasonable diligence could have had knowledge and notice thereof. That it was the duty of the defendants to use reasonable and ordinary care, to the end that the place where they had said Howerton working for them be reasonably safe and free from danger, and that it was the duty of the defendants to keep the said place where the said Howerton was working free from danger while the said Howerton was complying with the directions and commands of the defendants; but that the said place so furnished the said Howerton to do the work aforesaid was not a safe place, but, on the contrary, and by reason of the facts aforesaid, the same was a highly dangerous place, and because of the existence of said electric wires charged with electricity, as aforesaid, in close proximity to the place where said Howerton was working, the defendants failed in their duty to keep and maintain the said location where the said Howerton was then working free from

danger, and that by reason of the failure of the defendants to furnish the deceased Howerton a reasonably safe place in which to perform his labor, and their failure to keep the same free from danger, the said Howerton was killed."

The defendants filed a general and a special demurrer to the complaint, which demurrers were by the court overruled; whereupon they filed an answer, wherein they admitted the allegations of the complaint as to the conditions, location, connections, uses, and purposes of the wires and transformer pockets therein mentioned, and that the same were uninsulated and could not be insulated, and that the same were unprotected, except that the wire was located so far above the floor of the substation that it was impossible for anyone to come in contact with it while using ordinary care; and alleged, first, that Howerton "had the entire control and direction of the work he was employed to perform, and that he devised the plans for the same and directed and controlled the performance of the same in all its details"; second, with the exceptions of a few immaterial admissions, the defendants denied all other material allegations of the complaint; and, third, for a separate defense, they alleged: "That the death of Howerton was caused solely and only by his own negligence and carelessness contributing directly thereto, and not otherwise, and in this: That said Howerton was employed to devise and construct within said substation for the defendant Madison River Power Company a platform to extend from the east end of the top of the brickwork mentioned in the complaint to the east end of the substation building therein described, on which platform the wire mentioned in the complaint and two other wires, which were located on the top of the said brickwork and charged with 40,000 volts of electricity, were to be placed, and by it permanently supported and carried to the east end of said building, and thence through certain apertures in the east wall thereof prepared for that purpose; that pursuant to said employment said Howerton planned and devised said platform and its method of construction and erection, and between the hours of 7 o'clock A. M. and 9 o'clock A. M. of the twenty-third day of January, 1907, being about to proceed with the construc-

tion of the same, and having full knowledge of the dangerous character of said wires and all thereof, was warned by defendant Davidson not to go up in the course of said work where he might come in contact with said wire mentioned in the complaint, until he, the said Davidson, should turn off the current of electricity with which said wire was charged, and thereupon said Howerton stated to said defendant that his said work would not be sufficiently advanced to require him, the said Howerton, to go up where he might come in contact with said wire before about 3 o'clock in the afternoon of that day; and thereupon it was arranged between said Davidson and said Howerton that during the noon hour of said day said Davidson would turn off the current of electricity and turn said wire back so it would be safe for said Howerton to go up to the top of said brickwork in the progress of said work, and that said Howerton would not do so until said wire had been changed and turned back, and thereupon said Howerton proceeded with said work; and thereupon said Davidson, relying upon said arrangement, proceeded to work outside said substation, and about 9 o'clock A. M. of said day, while working alone in said substation, and notwithstanding said warning and arrangements for making it safe for him to go to the top of said brickwork, and before it was so made safe, and with full knowledge of the dangerous character of said wire and the danger of coming in contact therewith, the said Howerton carelessly and negligently, without the knowledge of defendants, or either of them, went up on a rough, temporary 'horse' for supporting certain temporary staging which he was building, about twelve feet high, which 'horse' he had constructed, and placed about three feet from the east end of said brickwork, mounting the same by means of boards which he had nailed on the west legs thereof so as to form a rough and unsafe ladder, and made use of the same in such manner as to bring himself near said wire mentioned in the complaint, and in some way to these defendants or either of them unknown he came in contact with said wire, and was immediately killed thereby. That said Howerton's death was caused by the contributory negligence of said Howerton him-

self; that said Howerton was employed as a carpenter to devise and construct a platform on which the wire mentioned in the complaint and two other wires in position on top of said brickwork were to be supported permanently and carried from the east end of said brickwork to the east end of said substation; that at the time of his employment he well knew, and was informed and warned, that said platform was to be built in said substation, and that said wires were located therein as in said complaint specified, and that the same were charged with electricity, and that it would be fatal to human life to come in contact with them, or any of them, but, notwithstanding such knowledge and information and warning, he accepted said employment, and freely and voluntarily entered upon the same with full knowledge of all the dangers attendant upon such employment. That, by reason of the premises, Howerton assumed the said risk of injury and death by reason of contact with electric wires charged with electricity so incident to the said employment, and his injury and death so received was not received or brought about by or through any neglect or default of the defendants, or either of them, but the same resulted from unforeseen and unavoidable accident, the risk of which the said Howerton assumed when he accepted said employment as aforesaid." The affirmative allegations of the answer were put in issue by the reply.

Those portions of the testimony which are material to the consideration of the appeal follow:

Frank McCabe, a witness for the plaintiff, testified as follows: "I am a carpenter. The circumstances under which Mr. Howerton and I were employed were that Mr. Davidson came to me. and wanted me to go out and do some work, and we went and looked at it, and, as we were coming in, he says, 'You get another man,' and I got Mr. Howerton to help to do the work. Howerton didn't go with me to the office of the company. I didn't present him to any of the officers of the company. I think I told him we would go to work the next morning. I talked with Mr. Mendenhall, and he said, 'You go and get another man,' and I got him, and we went to work the next morn-

ing. I expect we had worked there eight or ten days prior to the twenty-third day of January. Our work was continuous during that time, but some days we put in only an hour and a half or two hours a day. It was so cold that we couldn't stand it. We were working outside putting a hood on this building. While we were engaged in putting up that hood, we had to work around the electric wires. There were three or four wires that came out of the east end of the building—those that come downtown—and, when we first commenced the staging, we had to keep building to get to our work, and finally, when we put our staging under the wires, it would press them up, and we put them on top and pressed them down, and I asked Mr. Davidson if there was any danger. Howerton was present when this conversation took place. It was about 3 o'clock in the afternoon, and he said: 'You fellows better lay off until Monday, and I will run these wires out of the building and cut them.' He at that time said there was no danger—to put the planks on top of the wires. We laid a plank on the wires, and he finally said there might be danger if the boards were wet. I don't remember whether we stood on the plank after we put it on the wires or not. We built the lower staging; and I think we left the lower staging, and went on up. When we got the second staging up, we got to that glass wire, and there was a wire went out of the east of the building, and I told Mr. Davidson I was afraid of them, and he said there was no danger, and we walked over and crawled up around them. It was on the 22d, I think, Davidson told us to come back to work, no difference how cold it was. We could work inside, there being a stove there. Nothing further was said by Davidson to Howerton in my presence with reference to what we were to do the next morning—only we would start that framework. He had explained to us previous to that what he wanted done up there. I was present at the time of those explanations. Our instructions were so complete as to enable us to go to work without his being there. On the morning of the 23d there was some work to be done on the outside on the hood. I sawed a one by four half in two, and got it ready to put up, and Howerton went to

work making a 'horse.' He was working at the time right down here by this transformer-stall inside of the building. While I was getting this board ready, Howerton got the material in for his trestle. I helped him set that 'horse' up. I think the 'horse' must have been twelve feet high, and probably ten feet wide. When we got that 'horse' set up, during this time I had my work done, and there was some work out on the head of the hood, and I says: 'I'll go out and do my work, and you can stay in here.' While I was up on the ladder at work on the south end of the hood, I believe he came out. He came there and spoke to me, and I don't know what he done after that, because I was outside. After he went inside, from that time, maybe five or ten minutes—I don't know just now—but during the time Mr. Davidson had come out and gone south of where I was working, and directly we heard a racket inside like a plank slipping on this cement floor; and I heard Mr. Davidson say, 'My God!' and he started in the building and he says, 'There's a man on the wire,' and when I got in Mr. Davidson had been in and cut off the current, and we let him down onto the floor. Howerton was dead. When I first went into the building, I saw Howerton there on the wire. He had his arm around it. I think the wire was clear under his left arm. His hip was resting on this transformer. I would lack about three inches of reaching him when I went in. There was a space of about twelve or fourteen inches from this wire over to the edge of the brickwork. The end braces were not placed upon the end of the four-legged 'horses.' It just had the four legs on with cleats on for steps. Howerton and I generally both got there about the same time in the morning, and he and I were right close by one another that morning. During the time that Howerton was working there, Mr. Davidson was right down at the corner mixing up some cement. When I went outside to resume my work, Davidson was in the building, and I had not been out a great while until he came out himself. It was not over five minutes before the time that we all went in the building when Howerton was on the wire that Mr. Davidson came out. He was in the substation building within five min-

utes of the time that Howerton was found. When Mr. Davidson came out, he stood, I should say, about twenty-five feet from the door, in a position to look inside and see the brickwork. During the time that we were engaged at that building, I was working with Howerton all the time up until that morning."

In answer to the question, "Would it have been possible for Mr. Davidson to have expressed any warning to Howerton, or discussed with him the danger of any wires in the building without you knowing it?" the witness answered: "No, sir; I don't think he could have warned him, unless I would have heard him. I was working right close by Howerton the entire morning of the 23d up until I went out the last time. During that period of time no warning was expressed to Howerton, nor was the question of the danger of the wires in the building discussed with him. During the entire period of time that I have testified about, from the day I went to work there and during the periods of time that I was at work with Mr. Howerton up until the time I went out from the building, five or ten minutes before Howerton went on the wire, while I was in the presence and in the hearing of Howerton, there was nothing said or expressed on the question of the danger of the wires by Mr. Davidson or any other officer of the company. During that time while Howerton and I were together nobody had given us any intimation of the danger of the close proximity to the wires. Mr. Davidson was the foreman for the company. He was in charge of the Madison River Power Company's work which was being done on the building that morning by Howerton and me. Howerton was getting fifty cents an hour there at that time. The wires that we were working close to on the outside of the building were insulated wires, and Howerton and I had our hands on them. When Davidson employed me, he told me where he wanted me to work. He showed me what was to be done when we went there. He said he wanted a hood made. He and I figured out what would be required in the way of dimension lumber; that is, I told him what would be required and he did it. There was nothing said about pay. We were to be paid by the hour, we understood, when we worked there, and

we simply kept a charge for the hours we put in, and I think Mr. Davidson kept it too. It was on the 22d that the work was first pointed out to Howerton and me on the inside. Mendenhall and I had not talked about that when he employed me—just the hood. Davidson said he wanted a frame to hold that wire up on the transformer. He pointed out that they wanted brackets on the east end of the building and the bracket put up on the east end of the pocket or brickwork. He showed us how he wanted them put on and told us the dimensions, measurements, etc. He never gave any measurements. He just told Howerton and me in a general way and expected us to make measurements and fit the framework and things of that kind. He gave us no plans or specifications, but expected us men with our skill and experience to make the improvements. That is what we were expected to do. I knew that the low tension wires carried power downtown. I don't know that I knew at that time that the high tension wires were up on the top of that brickwork. I knew those wires were the high tension wires. I might have known those wires were dangerous, but I didn't know there were 40,000 volts. I am satisfied no warning could have been given without my knowing it. Before the accident or immediately after the accident, there were no diagonal crosspieces on this trestle. There were just the four on this leg and the one on the west leg. It would wobble a little, I expect. I did not help Howerton put the boards across the top of the two 'horses.' I didn't see that done. There were two boards clear across, and the third had fallen down. Two of these boards had been put across to the trestle that had been put against the wall on the other side, and the third board had evidently fallen while he was trying to put it on. The boards could be put up there very easily. One man could put them up. It might be wobbly, but I can put them up. As to whether putting those boards across there would cause that to weave back and forth, I will say that the weight of the boards would kind of strengthen the 'horse.' The weight of them would not strengthen them until they got fastened onto the other 'horse,' and

until that time they would be pretty wobbly. Howerton was a skillful carpenter. He was also a contractor."

The foregoing is not all of the witness' testimony, but enough to illustrate the proposition hereinafter discussed.

The wife of the deceased testified that her husband, who was forty-two years of age, was not familiar with electricity or electrical devices and appliances, had never had any experience with the same, and had never worked around them.

At the close of plaintiff's case, the defendants interposed a motion for nonsuit, which was overruled. Whereupon the defendant Davidson was sworn as a witness. He testified: "On the morning that Mr. Howerton made these two 'horses,' and while he was making them, we discussed the matter of his building two brackets, to go up on the east wall of the power house to hold a long sixteen-foot four by six that would carry three insulators to hold the wires up on that wall. He says: 'As soon as I finish these horses, I will go to framing up those brackets.' And I says, 'It will take you some time'; and he says, 'Oh, yes'; and I says, 'We can't do anything on this platform that we spoke about building, until we shut down at noon and take the current off and turn those wires back to the second insulators.' He then says: 'I won't have any occasion to go up there until 3 o'clock, as it will take me until that time framing those brackets.' I talked with him about those wires being dangerous. I says he must not go up there to do any work until the wires were turned back, so there would not be any danger of working up there. I don't know that I ever called his attention to those wires being dangerous before that time; had no occasion to, because they had never worked in proximity to those wires. He didn't at any time during the morning give me any notice of his having changed his intention and of his intention to go up there. When he stated that he would not go up there or have occasion to go up until 3 o'clock that afternoon, I believed what he said, and relied upon it. The wire that caused the death of Howerton has a covering on it, but the insulation, however, is no pro-

tection to a wire carrying that voltage. The conversation I had with Howerton of which I spoke could not have been more than fifteen minutes before he was killed. I think the four-legged 'horse' was about completed and in position when we were talking, because it was my impression he was going right to work at the bench framing up those two brackets that were to go on the wall. I think I testified at the coroner's jury that I did help Mr. Howerton set up one of those 'horses.' I may have helped to place the second horse in position."

This witness also testified that at the coroner's inquest he answered the following questions as follows: "Q. What precaution did you take, Mr. Davidson, to inform the men as to the dangers there? A. The verbal warning not to go near the wires. It is very well understood by all the men who work up there that it is dangerous to go near the wires, and not to go near them. Q. Are you sure you expressed the specific warning to Mr. Howerton? A. Yes, sir. Where these wires terminated, we were going to work up there, and I told him before we did anything I would shut the current down at noon, and turn these wires back, so there would not be any danger by going there whatever. Q. You told him that morning? A. I wouldn't say whether I told him this morning or last night, but it was understood we weren't to go up there to do any work until these wires were turned back."

The witness also testified that he was able to remember better after the lapse of thirteen months than he was at the time of the coroner's inquest, because Frank McCabe had testified positively it was not in his presence that the witness had made any such statements. The foregoing is not all of the testimony of the defendant Davidson, but sufficient for the purposes of this appeal.

At the close of all the evidence, the defendants separately and severally moved the court to direct the jury to return a verdict in their favor for the reasons set forth in the motion for nonsuit theretofore made, and for the additional reason that the testimony showed that Howerton was specifically warned by the defendant Davidson of the dangerous condition of the wire.

This motion was sustained, and under the direction of the court the jury returned a general verdict in favor of the defendants. Judgment was entered upon this verdict, and, from that judgment and an order denying his motion for a new trial, the plaintiff has appealed.

Messrs. Walrath & Patten, for Appellants.

The presumption obtained that deceased was in the exercise of due care until the contrary was shown either by the appellant's evidence or that of the respondents. (*Ryan* v. *St. Louis Transit Co.*, 190 Mo. 621, 89 S. W. 865, 2 L. R. A., n. s., 777.) The burden of alleging and proving contributory negligence on the part of Howerton rested upon the respondents, unless the appellant's case raised a presumption of contributory negligence. (*Ball* v. *Gussenhoven,* 29 Mont. 321, 74 Pac. 871; *Nord* v. *Boston & M. Con. C. & S. Min. Co.*, 30 Mont. 48, 75 Pac. 681; *Stephens* v. *Elliott,* 36 Mont. 92, 92 Pac. 45.) There was no inference of negligence on Howerton's part from the mere fact that he threw his arm over the electric wire in his fall from the staging. (*Birsch* v. *Citizens' Elec. Co.*, 36 Mont. 574, 93 Pac. 940.) Nor was there any inference of negligence from the fact that Howerton fell. (*Stevens* v. *United Gas & Elec. Co.*, 73 N. H. 159, 60 Atl. 848, 70 L. R. A. 119; *Drown* v. *New England Tel. etc. Co.*, 80 Vt. 1, 66 Atl. 801.)

The circumstances shown by the appellant, aided by the presumption which the doctrine of *res ipsa loquitur* raises, made out a *prima facie* case to go to the jury. (*Hardesty* v. *Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29; *McGowan* v. *Nelson*, 36 Mont. 67, 92 Pac. 40; *Benedick* v. *Potts,* 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478; *Griffin* v. *Manice*, 166 N. Y. 188, 82 Am. St. Rep. 630, 59 N. E. 925, 52 L. R. A. 922; *Jenkins* v. *St. Paul City Ry. Co.* (Minn.), 117 N. W. 931.)

The fact that a "suspicion" of negligence may attach to plaintiff does not relieve defendant of proving contributory negligence. (*Gulf etc. Ry. Co.* v. *Shieder*, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 538.) The duty was incumbent upon respondents

to warn Howerton of the danger, and unless they did so, the appellant was entitled to recover. (*Reeve* v. *Colusa G. & E. Co.*, 152 Cal. 99, 92 Pac. 89; *Millen* v. *Pacific Bridge Co.* (Or.), 95 Pac. 196; *Illinois Steel Co.* v. *Schymanowski*, 162 Ill. 447, 44 N. E. 876; *Stephens* v. *Elliott*, 36 Mont. 92, 92 Pac. 45.) Where the facts are uncertain it is error to direct a verdict. (*Paul* v. *Van Da Vinda*, 58 Hun, 611, 12 N. Y. Supp. 638; *Fitzgerald* v. *Hart* (Tex. Civ. App.), 23 S. W. 933.) Nonsuits and directed verdicts must not be granted when there is anything to be left to the jury. (*Nord* v. *Boston etc. Min. Co.*, 30 Mont. 48, 75 Pac. 681; *Michener* v. *Fransham*, 29 Mont. 340, 74 Pac. 450.) The weight of the evidence is a question for the jury. (*Ball* v. *Gussenhoven*, 29 Mont. 322, 74 Pac. 875; *Stephens* v. *Elliott*, 36 Mont. 92, 92 Pac. 45; *Kroeger* v. *Passmore*, 36 Mont. 504, 93 Pac. 807, 14 L. R. A., n. s., 988.) A case which fairly depends on the effect or weight of testimony should not be withdrawn from the jury unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it. (*Phoenix Mut. L. Ins. Co.* v. *Doster*, 106 U. S. 30, 1 Sup. Ct. 18, 27 L. Ed. 65; *Montclair Township* v. *Dana*, 107 U. S. 162, 27 L. Ed. 436, 2 Sup. Ct. 403; *Connecticut Mut. Life Ins. Co.* v. *Lathrop*, 111 U. S. 612, 4 Sup. Ct. 533, 28 L. Ed. 536; *Gardner* v. *Michigan Cent. Ry. Co.*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107.)

Messrs. Hartman & Hartman, and *Mr. J. L. Templeman*, for Respondents.

In a personal injury case, where the relation of master and servant is alleged in the complaint, and the proof shows the injured party to have been an independent contractor, there can be no recovery. (*Kansas C. & Mo. Ry. Co.* v. *Loosley*, 76 Kan. 103, 90 Pac. 990.) The decision is based on the well-known rule that the plaintiff must recover, if he recovers at all, upon the theory of his complaint. The use of dangerous machinery, and the maintenance and operation of a dangerous

business, inherently so, is not necessarily negligence; nor is lack of guards or covers thereto, in the absence of proof that such protection was reasonable and practicable, and a servant who knows or ought to know that the very things which he voluntarily goes to work upon are dangerous assumes the risk. (1 Shearman & Redfield on Negligence, 195; *Lafflin* v. *Buffalo etc. R. Co.*, 106 N. Y. 136, 60 Am. Rep. 433, 12 N. E. 599; *McGuerty* v. *Hale*, 161 Mass. 51, 36 N. E. 682; *Young* v. *Burlington etc. Co.*, 79 Iowa, 415, 44 N. W. 693; *Arizona Lumber Co.* v. *Mooney*, 4 Ariz. 366, 42 Pac. 952.)

This court has held that where the evidence is of such a character that they would unhesitatingly grant a new trial on the ground of insufficiency of the evidence to sustain the verdict, or where there is a mere scintilla of evidence, or where the conclusion to be reached from the testimony is equally consistent with either of the issues to be proven, a verdict should be directed or the motion for nonsuit sustained. (*Shaw* v. *New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515; *Nord* v. *Boston & Montana C. C. & S. M. Co.*, 30 Mont. 48, 75 Pac. 681; *Cummings* v. *Helena & L. S. & R. Co.*, 26 Mont. 434, 68 Pac. 852; *McGowan* v. *Nelson*, 36 Mont. 67, 92 Pac. 40; *Howie* v. *California Brewing Co.*, 35 Mont. 264, 88 Pac. 1007; *Olsen* v. *Montana Ore Pur. Co.*, 35 Mont. 400, 89 Pac. 731; *Hardesty* v. *Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29; *Forquer* v. *Slater Brick Co.*, 37 Mont. 426, 97 Pac. 843.)

While contributory negligence is a defense, and must be pleaded, yet, if plaintiff's case shows contributory negligence, the burden is upon him to show no negligence on his part, and unless he does so, he must be nonsuited. (*Nord* v. *Boston & Montana C. C. & S. M. Co.*, *Cummings* v. *Helena & L. S. & R. Co.*, *Shaw* v. *New Year Gold Mines Co.*, *supra*; *Nelson* v. *Boston & Montana C. C. & S. M. Co.*, 35 Mont. 223, 229, 88 Pac. 785; *Nelson* v. *City of Helena*, 16 Mont. 21, 39 Pac. 905; 1 Shearman & Redfield on Negligence, 110; see, also, *Dingley* v. *Starr Knitting Co.*, 134 N. Y. 552, 32 N. E. 35; *Leonard* v. *Miami Min. Co.*, 148 Fed. 827, 78 C. C. A. 517; *Peterson* v. *Union Iron*

Works, 48 Wash. 505, 93 Pac. 1077; *Gardner* v. *Porter*, 45 Wash. 158, 88 Pac. 121; *Fritz* v. *Salt Lake Electric Co.*, 18 Utah, 493, 56 Pac. 90; *Armstrong* v. *Town of Cosmopolis*, 32 Wash. 110, 72 Pac. 1038; *Olmstead* v. *Hastings Shingle Mfg. Co.*, 48 Wash. 657, 94 Pac. 474.)

Deceased seems to have unnecessarily and voluntarily, out of curiosity or carelessly, or otherwise, exposed himself to this unguarded electric force, and therefore, even though respondents had been negligent, his administrator cannot recover. (*Fritz* v. *Salt Lake Elec. Co.*, 18 Utah, 493, 56 Pac. 90; *Carroll* v. *Grande Ronde Elec. Co.*, 47 Or. 424, 84 Pac. 389, 6 L. R. A., n. s., 290.) Where the servant needlessly goes into a dangerous place, and his injury is proximately due thereto, he cannot recover. (Shearman & Redfield on Negligence, sec. 207; *Atwood* v. *Chicago, R. I. & P. Ry. Co.*, 72 Fed. 447-450.)

A servant is chargeable with actual notice of every fact which he would have known had he exercised ordinary care to keep himself informed as to matters concerning which it was his duty to inquire; and especially should this rule be applied where the servant's action is founded on the assumption that the master ought to have known of something which he did not actually know. (Shearman & Redfield on Negligence, sec. 217; *St. Louis, K. C. & C. R. Co.* v. *Conway*, 156 Fed. 234, 86 C. C. A. 1; Woods on Master and Servant, sec. 402; Bailey on Master's Liability, 22; *Galvin* v. *Old Colony Co.*, 162 Mass. 533, 39 N. E. 186; *Kauffman* v. *Maier*, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; see, also, *Burn* v. *Chronister L. Co.* (Tex.), 87 S. W. 163; *Kresanowski* v. *Northern Pacific Ry. Co.*, 18 Fed. 229, 5 McCrary, 528; *Tower Lumber Co.* v. *Brandvold*, 41 Fed. 919, 73 C. C. A. 153; *Crookston Lbr. Co.* v. *Boutin*, 149 Fed. 680, 79 C. C. A. 368; *Morris* v. *Duluth Ry. Co.*, 108 Fed. 747, 47 C. C. A. 661; *Gilbert* v. *Burlington & M. Ry. Co.*, 128 Fed. 536, 63 C. C. A. 27; *Montgomery* v. *Chicago G. W. Ry. Co.*, 109 Mo. App. 88, 83 S. W. 66.) This is the rule where the servant is *pro tempore* his own master, and therefore under obligations to look after his own welfare and safety. A different rule applies when he

is acting under a specific command from his master or from the master's representative. (*Withiam* v. *Tenino Stone Quarry*, 48 Wash. 127, 92 Pac. 900; *Anderson* v. *Inland Tel. Co.*, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410.) When the danger which besets the servant is apparent, it is equivalent to notice from the master of the existing dangers. (*Ford* v. *Heffernan Eng. Wks.*, 48 Wash. 315, 93 Pac. 417, 418.) When the facts are undisputed, and they permit only the one inference to be drawn from them that there was no occasion for the accident consistent with proper prudence and care on the part of the injured person, the plaintiff has failed to make a case. (*Baxter* v. *Auburn & S. Elec. Co.*, 190 N. Y. 439, 83 N. E. 469.) Where electrical appliances and machinery are so placed that persons would not, in the pursuance of their ordinary duties or vocations, or while acting within the scope of their licenses, come in contact therewith, the company is not liable to one occupying the position of a licensee or of a trespasser who is injured by such contact. (15 Cyc. 475; *Clements* v. *Louisiana Electric Co.*, 44 La. Ann. 692, 32 Am. St. Rep. 348, 11 South. 51, 16 L. R. A. 43.) Where "the evidence is undisputed, or is so clearly preponderant that it reasonably admits of but one conclusion, the proper disposition of the case upon the evidence becomes a question of law, to be determined by the court." (*Bell* v. *Carter*, 164 Fed. 417; *Robinson* v. *Denver City Tramway Co.*, 164 Fed. 174; *Swift & Co.* v. *Johnson*, 138 Fed. 867, 71 C. C. A. 619, 1 L. R. A., n. s., 1161; *Patillo* v. *Allen-West Min. Co.*, 131 Fed. 680, 65 C. C. A. 508; *Commissioners etc.* v. *Clark*, 94 U. S. 278, 24 L. Ed. 59; *Southern Pac. Co.* v. *Pool*, 160 U. S. 438, 16 Sup. Ct. 338, 40 L. Ed. 485; *Patton* v. *Texas R. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361.)

MR. JUSTICE SMITH delivered the opinion of the court.

1. It is suggested by the respondents that the complaint shows that the relation of master and servant did not exist between the defendants and the deceased. We find no express allega-

tion in the complaint that deceased was the servant of the defendants, but we do find the averments that deceased was "employed and hired by the defendant Madison River Power Company," and was "employed" by the company, and was "engaged in the performance of his duty under his employment"; and, as the gravamen of the whole complaint is that it was the duty of the defendants to use ordinary care to furnish the deceased a reasonably safe place in which to work, we think the complaint is sufficient in this particular.

2. But it is insisted that, if the complaint is sufficient in this regard, there was a fatal variance between the allegations thereof and the proof, in that the evidence shows that deceased was not a servant, but an independent contractor. The following pertinent quotation from 1 Shearman & Redfield on Negligence, sections 164, 165, we take from the brief of counsel for the respondents:

"Sec. 164. Although, in a general sense, every person who enters into a contract may be called a 'contractor,' yet that word, for want of a better one, has come to be used with special reference to a person who, in the pursuit of an independent business, undertakes to do a specific piece of work for other persons, using his own means and methods, without submitting himself to their control in respect to all its details. The true test of a 'contractor' would seem to be that he renders the service in the course of an independent occupation, representing the will of his employer only as to the *result* of his work, and not as to the means by which it is accomplished. * * *

"Sec. 165. * * * If he submits himself to the direction of his employer as to the details of the work, fulfilling his wishes, not merely as to the result, but also as to the means by which that result is to be attained, the contractor becomes a servant in respect to that work. * * * In most instances the distinction is easily observed. Thus one who contracts to do a specific piece of work, furnishing his own assistants, and executing the work either entirely according to his own ideas, or in accordance with a plan previously given to him by the person for

whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is clearly a contractor, and not a servant. The fact that such an employee is paid by the day, or that, in all the work, he consults and defers to the wishes of his employer, makes no difference, although an express contract to pay by the job is always strong evidence that the relation of master and servant does not exist."

It appears from the testimony that Davidson told McCabe that he wanted him to go out to the substation for the purpose of doing some work, and directed him to get another man to help him. In employing Howerton, McCabe acted as agent of the defendants. McCabe understood they were to be paid by the hour. The officers of the company pointed out what work was required. The materials were furnished by the company. The general plans were those of the company. In fact, the testimony shows that McCabe and Howerton submitted themselves to the control of the company and its officers in all the details of the work, and did not in any sense use their own means or methods, except in so far as they contributed to the work that special knowledge and experience possessed by them as carpenters, not possessed by the officers of the company. They were servants and employees, and not independent contractors. (*Jensen* v. *Barbour*, 15 Mont. 582, 39 Pac. 906.)

3. Reading the testimony of McCabe and Davidson in the light of what was said in *Allen* v. *Bell*, 32 Mont. 69, 79 Pac. 582, we think that Davidson was not a fellow-servant with deceased.

4. It is contended that the complaint does not state facts sufficient to constitute a cause of action, "in that it shows the proximate (or a proximate) cause of the injury to have been the act of Howerton, and it fails to show his freedom from negligence in the doing of the act." The cases of *Nord* v. *Boston & Montana Con. C. & S. Min. Co.*, 30 Mont. 48, 75 Pac. 681, *Ball* v. *Gussenhoven*, 29 Mont. 321, 74 Pac. 871, and *Cummings* v. *Helena & Livingston S. & R. Co.*, 26 Mont. 434, 68 Pac. 852, are relied upon. The quotation above is taken from the opinion of Mr. Commissioner Clayberg in the *Nord Case*, citing *Kennon* v.

Gilmer, 4 Mont. 433, 2 Pac. 21. But the pleader in this case has complied with the general rule laid down in *Kennon* v. *Gilmer*. He alleges that deceased "was engaged in the performance of his duty"; that he "accidentally lost his footing and in an attempt to prevent his falling from said height to the floor below, and, not knowing that the same was charged with electricity, threw his arm over the said wire"; that he "was inexperienced with electric wires, and did not know that the wire * * * was charged with electricity, and did not know that the said place where he was working was dangerous and unsafe because of the danger of his coming in contact with wires charged with electricity"; that the defendants had knowledge and notice of said conditions and negligently failed to inform deceased of them. We think this statement of the facts is a sufficient compliance with the rule, and that a formal allegation that deceased was free from contributory negligence was not necessary.

5. Appellant's counsel contend that under the admissions in the pleadings and the undisputed proofs on the trial there was and is only one question in the case, namely, whether Howerton was warned of the danger, and we are inclined to agree that this is the principal question involved. No complaint is made that the substation was not properly constructed, or that any of the appliances were defective or insufficient. It is alleged in the complaint, and tacitly admitted in the answer, that the wires were dangerous, or at least that wires charged with a high degree of electricity are liable to cause injury or death. The real grievance complained of is the failure to warn the plaintiff of the danger, inasmuch as he was ignorant of it. The defendants contended, and sought to prove, that the deceased was warned sufficiently so that he not only knew of the danger, but fully appreciated it. The question of the failure of the defendants to furnish approved or different appliances is not in the case. As we read the complaint, it charges that the place was dangerous, but that Howerton did not know of the danger or appreciate it, and that the defendants did have such knowledge and appre-

ciation of the danger, and negligently failed to communicate such knowledge to the deceased. That the case was tried upon this theory is shown by the defendants' answer and the nature of their evidence. The complaint in its general allegations of negligence is not very definite, certain or specific, but it is sufficient in that regard to withstand the attack made upon it in this court. A servant does not assume the risk of extraordinary dangers of which he has no knowledge or appreciation. (*Hollingsworth* v. *Davis-Daly Copper Co., ante,* p. 143, 99 Pac. 142; *Stephens* v. *Elliott,* 36 Mont. 92, 92 Pac. 45.) We also think the complaint satisfies the rule laid down in *Fearon* v. *Mullins,* 35 Mont. 232, 88 Pac. 794.

6. As the case must be retried, we do not deem it proper to comment upon the testimony to any greater extent than to say that the case does not fall within the principle considered in *McGowan* v. *Nelson,* 36 Mont. 67, 92 Pac. 40, *Howie* v. *California Brewery Co.,* 35 Mont. 264, 88 Pac. 1007, or *Olsen* v. *Montana Ore Pur. Co.,* 35 Mont. 400, 89 Pac. 731, but rather within the rules recognized in *Forquer* v. *Slater Brick Co.,* 37 Mont. 426, 97 Pac. 843, and *Hollingsworth* v. *Davis-Daly Copper Co., supra.* It is reasonably certain that Howerton's death was due to contact with the highly charged wire; and, if the jury believed McCabe's testimony, they might have concluded that deceased was engaged in doing what he was directed to do by the defendants, and had no knowledge that there was any danger to be apprehended from touching the wire.

7. We cannot say, as a matter of law, that the evidence discloses contributory negligence, or any negligence, on the part of the deceased. (*Birsch* v. *Citizens' Electric Co.,* 36 Mont. 574, 93 Pac. 940.)

8. On the point made by the respondents that deceased assumed the risk of danger from the wires, we have only to call attention, in addition to the fact that deceased was a carpenter and not an electrician, to McCabe's testimony as to what experience they had had with the outside wires, and what Davidson said with relation thereto.

9. It is not necessary to inquire to what extent a jury may disregard testimony. It cannot be said that Davidson's testimony was uncontradicted or unimpeached. We think the cause should have been submitted to the jury.

The judgment and order are reversed, and the case is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied March 13, 1909.

GARWOOD, APPELLANT, v. CORBETT ET AL., RESPONDENTS.

(No. 2,619.)

(Submitted February 16, 1909. Decided February 19, 1909.)

[99 Pac. 958.]

New Trial—Conflicting and Insufficient Evidence—Excessive Verdict—Duty of Court.

New Trial—Conflicting Evidence.

1. Where the evidence is conflicting, a motion for a new trial on the ground of insufficiency of the evidence to sustain the verdict is addressed to the sound legal discretion of the trial court.

Same—Insufficiency of Evidence—Duty of Court.

2. If, on motion for a new trial, the court concludes that the verdict is not supported by the evidence, it is its duty to set it aside.

Same—Excessive Verdict—Remission of Excess.

3. Where the jury returned a verdict for plaintiff for more than double the amount he was entitled to recover under the most favorable aspect of his testimony—thus evincing bias and prejudice—the trial court properly granted it a new trial, and was not obliged to refuse a retrial in case plaintiff consented to a remission of the excess.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by Joshua L. Garwood against Wallace Corbett and others. From an order granting defendants a new trial, plaintiff appeals. Affirmed.

Messrs. Mackel & Meyer, for Appellant.

Mr. John N. Kirk, Mr. W. R. Kirk, and *Mr. Geo. B. Dygert*, for Respondents.

MR. JUSTICE SMITH delivered the opinion of the court.

The complaint in this action alleges that in June, 1906, the defendants falsely represented to plaintiff that the Butte-Meaderville Copper Mining Company was a corporation and owned a large number of mining claims in the county of Silver Bow; that plaintiff believed such false representations, and, relying thereon, entered into an agreement with the defendants whereby he was to sell the stock of the corporation; that he was to be reimbursed for any moneys expended by him out of the proceeds of stock sold by him; that, in reliance upon the defendants' representations, he abandoned his position as stationary engineer in Butte, and went to South Bend, Indiana, for the purpose of selling stock, all at his own expense; that because of the fact that the company was not incorporated, he was unable to sell any stock, and was unable to reimburse himself for moneys expended and salary lost, to his damage in the sum of $3,000.

The testimony showed that the incorporation of the so-called Butte-Meaderville Copper Mining Company was not completed; that its property consisted of quartz locations and options, which the promoters contemplated transferring to the company in case it was eventually incorporated. The plaintiff testified that he went to South Bend and attempted to sell stock; that he interested certain prospective purchasers in the matter, and he says: "They raised but one question, and that was the title. They were satisfied with everything with reference to the company, except the title of the property. * * * They were satisfied to take stock, provided the title to the property was correct. They decided on Dr. S. L. Kilmer to come to Butte to examine the title. * * * I stayed there about two months,

and I first had intimation that the company was not incorporated, or that the title was not good about one month after I went back there, and, when I had information that this title was bad. they wanted to know what was the matter that I did not send their man back here. I was paying his expenses to come back here to investigate; and I left because I could not do any business, because they would not talk to me, because they thought I did not have anything, I guess. They thought I was a fake, I guess, toward the last, and I arrived here about the 8th or 9th of August, 1906."

The plaintiff introduced in evidence a contract dated June 9, 1906, authorizing him to sell 50,000 shares of the capital stock of the Butte-Meaderville Copper Mining Company under the following conditions, to-wit: 5,000 shares to be sold on or before July 4, 1906, and the balance on or before August 9, 1906, each of said shares to net the company $2.50. It appears that on July 11, 1906, another contract was sent him, wherein he was authorized to sell not to exceed 100,000 shares of the capital stock at the price of $1 per share. When he returned to Butte, he gave as a reason for not selling stock "that the second contract was sent to me cutting the price down and they did not want it at all, and, after I received that second contract and showed it, they did not want to talk to me." He also testified: "When I got back here, I gave you [Mr. Dygert] the reasons that you cut the prices on that, and that for that reason I could not do anything with it. I had a conversation with Mr. Tallant when I got back, in which I stated the reason why I had not sold the stock. I said I could not do anything with that stock, and also I said I had information that you had no title. * * * I first found out that the company had no title to this ground about a month after I had been there. I found out there was something crooked. I did not know that the company did not have title to the ground. I just got the information, and I took means to find out from the defendants, and I telegraphed to Mr. MacDonald to investigate, and I may have written to Mr. Tallant, but I won't say. I wrote to somebody other than the

defendants in this case. I first ascertained that this company was not incorporated six months after I returned from the east. I first had intimation that the title was not all right about a month after I had been east." The plaintiff was unable to sell any stock. His testimony was to the effect that he did not know before he went to South Bend that the company had not been incorporated, and did not know the condition of the titles; but several of the defendants testified that he knew all about the status of the so-called corporation, and was thoroughly conversant with the nature of the property that was to be transferred to the company. Two of the defendants testified that, when plaintiff returned to Butte, he stated that the reason he had failed to sell stock in South Bend was that there was not enough development work done on the ground; and Mr. Dygert testified that the plaintiff told him that the reason he had not sold any stock was that it was impossible to do anything with undeveloped property. Plaintiff's testimony also showed that his total expense in connection with the enterprise, including loss of time, amounted to $757. The jury returned a verdict in his favor for the sum of $1,500. A motion for a new trial was made, the grounds thereof being (1) excessive damages, appearing to have been given under the influence of passion or prejudice; (2) insufficiency of the evidence to justify the verdict, and that the verdict is against law. The district court of Silver Bow county granted the motion, and the plaintiff appeals from the order.

It will be recalled that the reason assigned in the complaint why the plaintiff was not able to sell stock was that the company had not been incorporated. His own testimony showed that he did not learn of this fact until long after he returned to Butte, and there is no evidence indicating that the prospective purchasers of the stock in South Bend ever had any knowledge on the subject; so that it is difficult to conceive how the plaintiff could have been entitled to a verdict in any event. However, the testimony was conflicting as to whether he knew before he entered upon the project that the company was not incorporated and the condition of the titles. Where the evidence

is conflicting, a motion for a new trial upon the ground of the insufficiency of the evidence to sustain a verdict is addressed to the sound legal discretion of the trial court. (*Stephens* v. *Elliott*, 36 Mont. 92, 92 Pac. 45.) If that court came to the conclusion that the verdict was not supported by the evidence—that is, that the evidence preponderated against the verdict—then it was the duty of the court to set it aside. (*Harrington* v. *Butte & Boston Min. Co.*, 27 Mont. 1, 69 Pac. 102; *Patten* v. *Hyde*, 23 Mont. 23, 57 Pac. 407; *White* v. *Barling*, 36 Mont. 413, 93 Pac. 348.)

It will also be observed that the verdict returned was about double what the plaintiff was entitled to, giving his testimony the most favorable consideration. It is suggested by counsel for the appellant that the trial court should have required plaintiff to remit the excess, and that this court has the power to do that also. It was said in *Helena & Livingston S. & R. Co.* v. *Lynch*, 25 Mont. 497, 65 Pac. 919: "Courts are reluctant to interfere with the verdict of a jury, and will not do so, on the ground of excessive damages given under the influence of passion and prejudice, unless it is apparent that their feelings of passion and prejudice have entered into and influenced their decision. Where it is apparent that this is the case, a new trial should be granted, unless it is also apparent that the verdict is otherwise correct, and the ends of justice will be fully served by requiring the successful party to remit the excess. In the latter case, however, it should clearly appear that upon the facts the successful party is clearly and as a matter of law entitled to a verdict in some amount, and that the prejudice and passion of the jury have gone no further than to lead them to swell the amount of damages; otherwise, all their deliberations must be deemed to have been permeated by their feelings, and the decision as a whole the result of passion, rather than of their calm, deliberate judgment." (See, also, *Lewis* v. *Northern Pac. Ry. Co.*, 36 Mont. 207, 92 Pac. 469.)

In view of all of the foregoing, we see no reason for thinking that the trial court abused its discretion in granting the defendants a new trial, and the order is therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

JOHNSON, RESPONDENT, v. CITY OF GREAT FALLS ET AL., APPELLANTS.

(No. 2,655.)

(Submitted February 15, 1909. Decided February 23, 1909.)

[99 Pac. 1059.]

License Taxes—Professions and Occupations—Statute—Constitutionality—Legislative Procedure—Final Passage—Vote—Raising Revenue—Power of Cities and Towns—Police Regulations—Dentistry.

Statutes—Legislative Procedure—Final Passage—Vote—Constitution.

1. After a bill has, on third reading, passed the house in which it originated, the vote being taken by ayes and noes and the names of those voting entered on the journal, as required by section 24, Article V of the Constitution, and is amended in the other house of the legislative assembly, and then returned to the first for action on the amendments, it is not necessary that the vote on the adoption of the amendments thus made be again taken by ayes and noes and the names entered on the journal.

Same—Constitutionality—License Taxes—Cities and Towns.

2. *Held*, under the rule stated above, that House Bill 203, enacted into law in 1897 (Laws 1897, p. 203 [sec. 3259, Revised Codes]), authorizing cities and towns *inter alia* to impose a license tax upon professions and occupations, is not open to the constitutional objection that it was not passed as required by section 24, Article V of the Constitution, declaring that on final passage of a bill the vote shall be taken by ayes and noes and the names of those voting entered in the journal.

License Taxes—Raising Revenue—Legislature cannot Delegate Power.

3. The Constitution, section 1, Article XII, in giving to the legislature the sole right to raise revenue by the imposition of a license tax upon persons and corporations doing business in the state, has thereby denied the power to any other body; and, therefore, the legislature cannot delegate the authority thus conferred to cities and towns.

Same—Power of Cities and Towns—Police Regulations.

4. While the legislature may not confer upon cities and towns the right to impose a license tax upon professions and occupations for the purpose of *raising revenue*, it may, in the absence of constitutional limitation, authorize them to impose such a tax in aid of *police regulations*.

Dentistry—Subject to Police Regulation.

5. *Held*, that the practice of dentistry is a proper subject for police regulations.

Police Power—Concurrent Exercise by State and Municipalities.

6. *Obiter:* The police power may be exercised concurrently by the state and a municipality.

Police Regulations—Dentistry—Cities and Towns—Limit of Power.

7. The power of a city or town to impose a license tax upon the right to practice the profession of dentistry as a police regulation, does not imply the power to refuse to license and thus to prohibit the pursuit of the profession.

Cities and Towns—Occupation Licenses—Power to Impose.

8. Section 4, Article XII, which, in empowering cities and towns to assess and collect taxes, deals with revenue and taxation exclusively, does not impliedly deny the power to such municipalities to impose license taxes in furtherance of police regulations.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by R. R. Johnson against the City of Great Falls and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Mr. C. A. Spaulding, and *Mr. W. F. O'Leary*, for Respondent.

Mr. John W. Stanton, for Appellants.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Pursuant to the provisions of House Bill No. 203 of the Fifth Legislative Assembly (Laws 1897, p. 203), the city of Great Falls passed an ordinance imposing a license fee or tax of $3 per quarter upon practicing dentists. Under protest the plaintiff in this action paid to the city of Great Falls the license fee of $3 for practicing his profession as a dentist, and brought this action against the city and the city treasurer to recover the amount so paid. The district court decided in favor of the

plaintiff, and the city and city treasurer have appealed from the judgment.

Two contentions are made by counsel for respondent: (1) That House Bill 203 was not passed in the manner prescribed by the Constitution; and (2) in any event the city of Great Falls could not lawfully impose the license fee or tax.

1. Our Constitution (section 24, Article V) provides: "No bill shall become a law except by a vote of a majority of all the members present in each house, nor unless on its final passage the vote be taken by ayes and noes and the names of those voting be entered on the journal." In *Palatine Ins. Co.* v. *Northern Pacific Ry. Co.*, 34 Mont. 268, 85 Pac. 1032, this court held that the legislative journals may be consulted to determine whether the mandate of the Constitution has been observed. An examination of the enrolled bill and the journals discloses that House Bill 203 originated in the House of Representatives, where it was passed on third reading, the vote being taken by ayes and noes, and the names of those voting being entered on the journal. It was then transmitted to the Senate, where it was amended and, as amended, was passed on third reading, and the like record of the vote made. It was then returned to the House, where the amendments were concurred in, but the names of those voting on the amendments were not entered on the journal. It is now contended that the vote on the Senate amendments was in fact the vote of the House upon the final passage of this bill, and, since it was not taken in the manner prescribed in the Constitution, the bill did not become a law. While this is a new question in this jurisdiction, it is not a new one in this country. Most of the states have similar constitutional provisions, and this question has arisen frequently. In 26 American and English Encyclopedia of Law, 544, it is said: "The final passage of a bill, within the meaning of such a provision, is the vote on which each house adopts the bill after it has passed its first and second readings and after it has been read again for the purpose of being put upon its passage, and where a bill has been passed in one house and amended and passed in the other, it is not necessary that the vote on the

adoption of such amendment by the house in which it was first passed shall be taken by yeas and nays and entered on the journal." The decided weight of authority supports this view. Some of the leading cases are: *McCulloch* v. *State*, 11 Ind. 424; *Hull* v. *Miller*, 4 Neb. 503; *State* v. *Dillon*, 42 Fla. 95, 28 South. 781; *O'Hara* v. *State*, 121 Ala. 28, 25 South. 622; *Miller* v. *State*, 3 Ohio St. 475; *Cantini* v. *Tillman* (C. C.), 54 Fed. 969.

The only cases to which our attention is called, holding that the vote upon the amendments to a bill must be by ayes and noes and the record made of the vote, are *Cohn* v. *Kingsley*, 5 Idaho, 416, 49 Pac. 985, 38 L. R. A. 74, and *Norman* v. *Board of Managers*, 93 Ky. 537, 20 S. W. 901, 18 L. R. A. 556. *Glenn* v. *Wray*, 126 N. C. 730, 36 S. E. 167, and *Erwin* v. *State*, 116 Tenn. 71, 93 S. W. 73, present somewhat similar questions. All of these cases, however, have been decided since the adoption of our Constitution, and the Constitutions of those states are materially different from ours; but, if we apply the doctrine announced by the Idaho and Kentucky courts, the result would be to very materially embarrass legislation, for, carried to its logical effect, it would require that the same procedure be taken with an amended bill as with an original one, and the Supreme Court of Idaho recognizes this, for it says: "A bill which passes the House, and is materially changed by amendment by the other house, and then sent back to the house where it first originated, must go through the same procedure as to reading and final vote as if it was an original bill." Applied here, that rule would require that, when the amended bill is returned to the house in which it originated, it would have to be referred to a committee, returned therefrom, printed for the use of the members, and take the usual course of an original bill. Our Constitution does not require this, and an examination of the legislative journals discloses that it has never been the practice in our legislative procedure, and, while not conclusive, the construction given by the legislature to those provisions of the Constitution dealing with legislative procedure is entitled to great weight. At the time our Constitution was adopted the rule was quite uniform, so far as established by judicial decisions, that

in the house originating a bill the vote on amendments proposed by the other house need not be by ayes and noes, and the names of those voting need not be entered on the journal, and, in the absence of anything indicating a contrary view, we must assume that the framers of our Constitution, in adopting section 24 of Article V, did so intending that the rule of interpretation then in vogue should be applied to it. Under these circumstances we hold that in passing House Bill 203 the mandate of the Constitution was met, and the bill properly became a law.

2. The second question presented is: Does House Bill 203 authorize the city of Great Falls to impose a license tax upon dentists, or, in other words, can the legislature empower a city to impose such license tax? It is elementary that every license tax is imposed for raising revenue or as a police regulation, or for both purposes.

(a) Section 1, Article XII, of the Constitution, gives to the legislature authority to raise revenue by the imposition of a license tax upon persons and corporations doing business in the state. The provisions of the Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise. (Article III, sec. 29.) In the absence of express words declaring the contrary rule, we must hold that the provision of section 1, Article XII, to which reference is made above, is prohibitory, and, the Constitution having conferred the power upon the legislative assembly, has denied the power to any other body; and, this being so, the legislature could not delegate the authority thus conferred to cities or towns. What we have said, however, applies to the authority to impose a license tax for the purpose of raising revenue only.

(b) But with respect to a license imposed as a police regulation the situation is entirely different. In the absence of constitutional limitation, the legislature, speaking generally, is left free to deal with the subject directly or through the agency of cities or towns, and may properly authorize such cities or towns to impose a license tax upon any industry or upon the right to transact any business which falls within the scope of police regulations. It would scarcely be possible to enumerate all

occupations which fall within the sphere of police regulations. We do not know that any court or text-writer has ever attempted to do so. The individual cases are treated as they arise. but in 25 Cyc. 614, a very extended list of occupations which have been held to be subject to police regulations is given. Counsel for respondent cite, and rely upon, *Sonora* v. *Curtin*, 137 Cal. 583, 70 Pac. 674, which holds that the city of Sonora cannot impose a license tax upon an attorney at law, for the reason that the business of an attorney is not the proper subject of police regulation; but that case stands practically alone in such holding. The overwhelming weight of authority is to the contrary. For some authorities announcing the general rule, see Tiedeman's Limitations of Police Power, sec. 87; 25 Cyc. 614; 22 Am. & Eng. Ency. of Law, 932; Prentice on Police Powers, ch. 16; *State ex rel. Smith* v. *Board of Dental Examiners*, 31 Wash. 492, 72 Pac. 110. In fact, in Montana the very statute which this respondent invokes—the statute regulating the practice of dentistry (Revised Codes, secs. 1573-1584)—is itself a police regulation, and its existence on our statute books cannot possibly be justified upon any other theory. The same is true with respect to the statute regulating the practice of medicine (sections 1585-1593), osteopathy (sections 1594-1606), optometry (sections 1607-1621), pharmacy (sections 1622-1638), the trade of engineer (sections 1648-1659), and statutes applicable to some other trades and professions. It is beyond controversy, then, that the statute does treat these professions and trades as proper subjects of police regulation. The decisions of this court in *State ex rel. Board* v. *District Court*, 26 Mont. 121, 66 Pac. 754, holding that the state may properly subject the practice of medicine to its police regulations, is directly applicable here and sets at rest the question raised by counsel for respondent. That the police power may be exercised concurrently by the state and a municipality is a general rule of law recognized almost everywhere. (25 Cyc. 601.)

But it is suggested that the power to license presumes the power to refuse to license, and therewith the power to prohibit the pursuit of the profession altogether; but this does not fol-

low. In 28 Cyc. 721, it is said: "In the exercise of its authorized police power to that effect, a municipality may regulate an occupation or business which it may not prohibit, and for this purpose it may require a license where it has no power of taxation"—and numerous cases are cited in support of the text.

There is also the suggestion that, since the Constitution, in section 4, Article XII, authorizes the legislature to empower cities and towns to assess and collect taxes, the authority to impose a license tax is at least impliedly denied; but it is sufficient answer to say that Article XII deals with revenue and taxation exclusively, and does not attempt to deal with police regulations, so that it cannot be said that the authority to assess and collect taxes is a prohibition against doing anything else.

It must be held, therefore, that House Bill 203 only authorizes a city to impose a license tax as a police regulation, and the city ordinance of Great Falls in question must be held to impose the license tax for that purpose exclusively.

Our conclusions are (1) That House Bill 203 was properly enacted; and (2) that the city of Great Falls can collect the license tax from the respondent. Under these views the complaint does not state facts sufficient to constitute a cause of action, and will not support a judgment in favor of plaintiff.

The judgment is reversed and the cause is remanded, with directions to dismiss the action and enter judgment in favor of the defendants for costs.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

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MONTAGUE, RESPONDENT, v. HANSON, APPELLANT.

(No. 2,565.)

(Submitted February 15, 1909. Decided February 23, 1909.)

[99 Pac. 1063.]

Personal Injuries—Public Stores—Dangerous Premises—Trapdoors—Complaint—Sufficiency—Duty of Storekeeper to Customers—Verdict — Reasonableness — Instructions—Harmless Error.

Personal Injuries—Dangerous Premises—Complaint—Sufficiency.

1. The rule that one who by his own act has brought personal injury upon himself must allege in his complaint that he exercised reasonable care and prudence (*Kennon* v. *Gilmer*, 4 Mont. 433), does not apply where the injury was sustained while plaintiff was going into a place which he was invited to enter, by some hidden or unknown cause of the existence of which it was the duty of defendant, who had control of the place, to give him warning.

Same—Storekeepers—Duty to Customers.

2. A storekeeper owes to persons who, in response to an invitation to purchase goods, come to his store, the duty to exercise ordinary care to keep his premises safe, as well as to warn them of any hidden or lurking danger thereon.

Same—Trapdoors—Duty of Defendant.

3. Plaintiff, who, upon entering a store for the purpose of trading, fell into an open and unguarded cellarway which he did not see and of the danger incident to which defendant owner did not apprise him, could, in entering, act upon the assumption that defendant had done his duty to keep the premises safe, and was under no obligation to keep a constant watch to avoid danger.

Same—Evidence—Contributory Negligence—Negligence of Defendant.

4. Evidence *held* sufficient to justify the jury in finding that plaintiff's injury, sustained in falling into an open cellarway in defendant's store, was not due to his contributory negligence, and that defendant storekeeper was negligent is not warning plaintiff of the existence of the danger.

Same—Reasonableness of Verdict.

5. Where plaintiff, a farmer sixty-eight years of age, sustained a dislocated shoulder by a fall into an open cellarway in a public store, was disabled from thereafter attending to his business, and suffered much physical pain, a verdict in his favor for $941.70 was not excessive.

Same—Earning Capacity—Lack of Evidence—Motion to Withdraw from Jury—Refusal—Harmless Error.

6. Where plaintiff failed to introduce evidence touching his loss of earning capacity, the denial of a motion to withdraw from the jury the question of damages sustained on that account, while error, was nonprejudicial, in view of an instruction, subsequently given, which accomplished the same purpose.

Same—Inability to Pursue Established Course of Life—Element of Damage.

7. Merely because the earning capacity of plaintiff, a farmer sixty-eight years old, may have been so small as to be a negligible element in making up the estimate of the damages which he could recover, he was none the less entitled to compensation for the destruction of his capacity to pursue his established course of life—an element distinct from loss of earning capacity.

Same—Refusal of Instruction—Non-prejudicial Error.

8. The court having instructed the jury that defendant storekeeper was only bound to use ordinary care, and that, if they found that he had discharged the obligation resting upon him to warn plaintiff of the existence of the open cellarway, they should find for defendant, its action in refusing to charge that the mere fact that the cellarway was open for the purpose of obtaining goods from the basement, did not constitute negligence *per se*, was not prejudicial error. While the instruction might well have been given, the jury must have understood that the mere existence of the trapdoor could not convict the defendant of negligence.

Appeal from District Court, Custer County; C. H. Loud, Judge.

ACTION by John W. Montague against Charles Hanson. Judgment for plaintiff, and defendant appeals from it and an order denying him a new trial. Affirmed.

Mr. Sydney Sanner, for Appellant.

Where the complaint shows that a proximate cause of plaintiff's injury was the act of the plaintiff himself, it must also state his freedom from negligence in the doing of the act; otherwise the pleading is bad. (*Kennon* v. *Gilmer*, 4 Mont. 433, 2 Pac. 21; *Nelson* v. *City of Helena*, 16 Mont. 21, 39 Pac. 905; *Hunter* v. *Montana C. Ry.*, 22 Mont. 534, 57 Pac. 140; *Cummings* v. *Helena & L. S. & R. Co.*, 26 Mont. 434, 68 Pac. 852; *Ball* v. *Gussenhoven*, 29 Mont. 328, 74 Pac. 871; *Nord* v. *Boston & M. C. G. & S. M. Co.*, 30 Mont. 48, 75 Pac. 681.) That the plaintiff's own act in stepping into the cellarway was a proximate cause of the accident and injury, see *Kennon* v. *Gilmer*, *Cummings* v. *Helena & L. S. & R. Co.*, and *Hunter* v. *Montana C. Ry.*, *supra*, and *Massey* v. *Seller*, 45 Or. 267, 77 Pac. 397; *Johnson* v. *Ramberg*, 49 Minn. 341, 51 N. W. 1043; *Bedell* v. *Berkey*, 76 Mich. 435, 15 Am. St. Rep. 370, 43 N. W. 308; *Hilsenbeck* v. *Guhring*, 131 N. Y. 674, 30 N. E. 580;

Schmidt v. *Bauer*, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580; *Dunn* v. *Kemp*, 36 Wash. 183, 78 Pac. 782; *Swanson* v. *Boutell*, 95 Minn. 138, 103 N. W. 886. Where a mere condition exists which is passive and ineffective unless made concurrent with some circumstance, force or event, the circumstance, force or event necessary to make the condition effective is always a proximate cause of whatever may result from the concurrence. (Cases cited, *supra; Missouri Pacific Ry.* v. *Columbia*, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399; *Goodlander Mill Co.* v. *Standard Oil Co.*, 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583; *Cole* v. *German S. & L. Co.*, 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416.)

Cognate to the foregoing is the proposition that in a case of personal injury growing out of circumstances in which the injured party was an actor, and his act a proximate cause, the burden is upon him to establish his freedom from contributory negligence. The evidence submitted in plaintiff's behalf not only does not show his freedom from contributory negligence, but it affirmatively shows that he did not exercise ordinary care, and hence the motion for a directed verdict or the motion for nonsuit should have been granted. (Cases cited, *supra; Hutchins* v. *Priestly etc. Co.*, 61 Mich. 252, 28 N. W. 85; *Accousi* v. *Stowers Furn. Co.* (Tex. Civ. App.), 87 S. W. 861; *Greenwell* v. *Washington Market Co.*, 21 D. C. 298; *Gaffney* v. *Brown*, 150 Mass. 479, 23 N. E. 233; *Brenstein* v. *Mattson*, 10 Daly (N. Y.), 336; *Salem-Bedford Stone Co.* v. *O'Brien*, 12 Ind. App. 217, 40 N. E. 430; *Louisville N. & C. Ry.* v. *Shanks*, 94 Ind. 598; *Ballou* v. *Collamore*, 160 Mass. 246, 35 N. E. 463; *Young* v. *New York etc. Ry.*, 107 N. Y. 500, 14 N. E. 434; *Meredith* v. *Cranberry Coal & Iron Co.*, 99 N. C. 576, 5 S. E. 659; *Glascock* v. *Central etc. R. R. Co.*, 73 Cal. 137, 14 Pac. 518.) One is presumed to see what with reasonable care or attention he could see, and it is no excuse that he did not see what he could have seen with reasonable care; failure to do this is contributory negligence. (*Thomas* v. *Boston & Montana etc. Min. Co.*, 34 Mont. 374, 86 Pac. 499, 87 Pac. 972; *Nelson* v. *Boston & Montana etc. Co.*, 35 Mont. 227, 88 Pac. 785.)

Mr. George W. Farr, for Respondent.

In this case the plaintiff must be regarded as having been on the premises of the defendant as an invitee by express invitation of the defendant. He was where he had a right to be. For cases defining the word "invitation," and particularly as applying that term, and distinguishing between what is called an implied and an express invitation, the following are in point: *Sweeny* v. *Old Colony etc. R. R. Co.,* 10 Allen, 368, 87 Am. Dec. 644; *Freer* v. *Cameron,* 4 Rich. 228, 55 Am. Dec. 663; *Turess* v. *New York etc. Co.,* 61 N. J. L. 314, 40 Atl. 614; *Bennett* v. *Louisville & R. Ry. Co.,* 102 U. S. 577, 26 L. Ed. 235. From the above authorities it cannot be contended that a person in a store for the purpose of making a purchase is anything but an invitee, as that term is used in a legal sense. The owners of stores have been held liable in those cases where a patron of the store was injured by falling over strips nailed along the floor, used as coverings for soda-water pipes. (*Polenske* v. *Lit Bros.,* 18 Pa. Super. Ct. 474.) Where a customer, upon the invitation of the merchant, placed packages behind the counter, and in going to get them afterward fell through a trapdoor that was shut at the time he deposited the packages (*League* v. *Stradley,* 68 S. C. 515, 47 S. E. 975), it was held that an open trapdoor in the back part of the store where goods were stored was negligence rendering the storekeeper liable for injuries caused thereby to persons coming into that part of the store. (*Pelton* v. *Schmidt,* 104 Mich. 345, 53 Am. St. Rep. 462, 62 N. W. 552.) Where a party undertook at night to cross the back yard of the city hall, as he lawfully might, and fell into a hatchway and was injured, the city was liable for failure to provide a light. (*Lowe* v. *Salt Lake City,* 13 Utah, 91, 57 Am. St. Rep. 708, 44 Pac. 1050.) Authorities on the general proposition as to the duties owed a person upon the premises of another, at the latter's invitation, are found in 6 Current Law, section 2, page 753. Each one of the cases cited by the appellant was a case involving the proposition of plaintiff being present in a place where he had no right to be, where he was not

there by invitation, or upon some private part of the premises of the defendant, and not in the course of his business.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for damages for a personal injury. At the time the injury occurred plaintiff was of the age of sixty-eight years. He had been engaged in farming and stockraising, and other pursuits requiring manual labor. The defendant is a merchant residing at Fallon, Custer county, where he keeps for sale a general stock of goods, wares, and merchandise, soliciting the patronage of the people residing in that vicinity and the public generally. The main room of his store building is seventy-five feet in length by twenty feet in width. Underneath is a cellar, reached by a cellar or stairway leading down from the storeroom, through an opening in the floor. This opening is covered by a flapdoor when the stairway is not in use. The room is fitted up with conveniences for displaying and selling wares to customers. Two parallel counters extend from the front most of the distance to the rear of the room, leaving an aisle or passageway along the middle. In the space beyond the end of the counter on the right to one entering from the front is a stove for heating purposes, around which in cold weather customers gather for warmth. The opening by which the cellar is reached is also in this space, along the side of the room in close proximity to both the stove and the end of the counter. When the stairway is in use, the flap is lifted and thrown back against the right side of the building. On March 31, 1905, plaintiff drove from his home to the store of defendant to purchase goods. On his arrival he entered by the front door. After alleging these facts in substance, the complaint proceeds: "That he [plaintiff] approached the said defendant, who was standing in the center of the said storeroom, and greeted the said defendant and shook hands with him, and, being cold, advanced from the place where he was and from where the said defendant was standing, along the open public passageway in the said

storeroom, to and in the immediate vicinity of the said stove for the purpose of being made warm by the heat from the said stove, and while so in the said store building by the permission and invitation of the said defendant for the purpose of transacting business with him, the said defendant had negligently and carelessly left the said cellar doorway open to the said cellarway, which was close to and in the immediate vicinity of the said stove and so close to the said stove that persons would necessarily, in proceeding to the said stove or going to the same for the purpose of being made warm, be likely to fall into the said open cellar door. The said defendant negligently and carelessly wholly failed to caution or warn this plaintiff that the said cellar doorway was open or dangerous, and this plaintiff not then knowing of the existence of the said cellar door, or that the same was open, approached the said stove, and, the said cellar door being then by the negligence of the said defendant left open and not in any manner protected, this plaintiff, in consequence thereof, fell through the said open, unprotected cellar doorway and was violently precipitated and thrown down into the said cellar, a distance of about ten feet, and thereby greatly injured and bruised upon his head, arms, and body, and had his right shoulder and the muscles and bones thereof broken and injured, and his right arm and hand injured and disabled, and in consequence thereof such injuries remain and now are permanent." It is then alleged that the plaintiff has suffered damage by expenses incurred for medical attention, for anguish and pain, for loss of time, and the result of permanent disability in the sum of $3,000. Judgment is demanded for this amount.

The answer admits that the plaintiff fell into the cellarway as alleged, but denies that the injuries sustained were serious or resulted in permanent disability. It is alleged that the fall was the result of plaintiff's own want of care and circumspection, and as a separate defense defendant charges contributory negligence. Plaintiff had verdict and judgment. Defendant has appealed from the judgment and an order denying him a new

trial. The integrity of the judgment is assailed on several grounds.

1. The first contention made is that the complaint does not state a cause of action, in that it discloses the fact that the injury was caused by plaintiff's own act, and it is nowhere alleged that he was at the time exercising reasonable care and circumspection, or that he was himself free from fault. Counsel invoke with confidence the rule laid down by this court in *Kennon* v. *Gilmer*, 4 Mont. 433, 2 Pac. 21, that, if the complaint shows that the plaintiff's own act was the proximate cause of his injury or proximately contributed thereto, it will be held insufficient unless it goes further and by appropriate allegations shows that the plaintiff was at the time exercising ordinary care and circumspection. The rule declared in this case has been repeatedly recognized by this court. (*Nelson* v. *City of Helena*, 16 Mont. 21, 39 Pac. 905; *Ball* v. *Gussenhoven*, 29 Mont. 321, 74 Pac. 871; *Nord* v. *Boston & Montana Con. C. & S. Min. Co.*, 30 Mont. 48, 75 Pac. 681; *Birsch* v. *Citizens' Electric Co.*, 36 Mont. 574, 93 Pac. 940.) It is based upon the obviously just principle that one who has brought injury upon himself by his own act cannot lay responsibility for it upon another unless he can allege and show that the act causing the injury was impelled by the apparent necessities of a perilous condition brought about by the negligence of such other person. It does not apply to cases where the plaintiff has been injured upon going into a place where he has a right to go, by some hidden or unknown cause, of the existence of which it is the duty of the person having control of the place to give him warning.

The facts alleged show that the plaintiff was not a mere licensee upon the defendant's premises by his silent acquiescence. If this were so, defendant would not have owed him any duty, other than to refrain from doing him willful or wanton injury after being informed of his presence. (*Driscoll* v. *Clark*, 32 Mont. 172, 80 Pac. 1, 373; *Egan* v. *Montana Central Ry. Co.*, 24 Mont. 569, 63 Pac. 831.) He was there to purchase goods in response to an invitation, it matters not whether express or implied, extended to all persons in the vicinity and to the pub-

lic generally, to go there for that purpose. To all such persons the defendant owed the duty to use ordinary care to have the premises safe, as well as to warn them of any hidden or lurking danger thereon. On this subject Mr. Thompson, in his work on Negligence (vol. 1, sec. 968), says: "On the contrary, the owner or occupier of real property is under the duty of exercising reasonable or ordinary care and prudence to the end of keeping his premises safe for the benefit of those who come upon them by his invitation, express or implied; and if, through a neglect of this duty, they are, without negligence or fault of their own, injured by reason of any negligent defect therein, he must pay damages. The person so invited to come upon the premises of the other is entitled to assume that they will be in a reasonably safe condition. He must not expose them to hidden dangers of which they are not aware, but of which he is, or may be, by the exercise of reasonable care, aware, especially if the danger is in the nature of a trap. To bring a case within this rule, it is not at all necessary that the person invited to come upon the premises should have had any business that would or would not be of any benefit to the owner or occupier." Again the same author states the rule thus: "The principle is that there is an implied invitation to members of the public seeking to do business with the owner or occupier of such building or grounds, such as he invites the public to do with him, to come into his building or upon his premises for that purpose; and therefore that he is under a legal obligation to exercise ordinary or reasonable care to the end of making his premises safe for their protection—in other words, for the protection of his customers." (Section 985.)

Judge Cooley, in the third edition of his work on Torts (Vol. 2, p. 1259), says, that when one "expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit." In *Carleton* v. *Franconia Iron & Steel Co.*, 99 Mass. 216, the court, through Mr. Justice Gray,

used this language: "The owner or occupier of land is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for any injury occasioned by the unsafe condition of the land or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist and has given them no notice of." (*Sweeny* v. *Old Colony & Newport R. R. Co.*, 10 Allen (Mass.), 368, 87 Am. Dec. 644.) The precaution necessary to be observed extends to unguarded trapdoors in places where customers usually or may lawfully go (*Moore* v. *Korte*, 77 Mo. App. 500; *Engle* v. *Smith*, 82 Mich. 1, 21 Am. St. Rep. 549, 46 N. W. 21; *Massey* v. *Seller*, 45 Or. 267, 77 Pac. 397; *Bennett* v. *Louisville & Nashville R. R. Co.*, 102 U. S. 577, 26 L. Ed. 235), as well as to other sources of danger, such as caustic or other poisonous chemicals with which customers or their property may be brought in contact through lack of knowledge (*Beinhorn* v. *Griswold*, 27 Mont. 79, 94 Am. St. Rep. 818, 69 Pac. 557, 59 L. R. A. 771; *Atlanta Cotton Seed Oil Mills* v. *Coffey*, 80 Ga. 145, 12 Am. St. Rep. 244, 4 S. E. 759). Where the situation is such that the source of the danger is not or cannot be guarded, the duty to exercise care to warn, such as is reasonably necessary, is imperative, and for failure in this regard the owner must respond in damages. (1 Thompson on Negligence, sec. 993; *Brosnan* v. *Sweetser*, 127 Ind. 1, 26 N. E. 555.)

Recurring to the question at issue, it appears with certainty: That the plaintiff was at defendant's place by invitation as a customer, to purchase goods; that he was in ignorance of the existence of the cellarway; that it was in close proximity to a place to which customers were expected to go; that the defendant was standing by and had notice of plaintiff's presence; that the cellarway was open and unguarded; that defendant failed to notify him of this fact. This, together with the preceding statement of facts showing the surrounding circumstances, was sufficient to show a duty on defendant's part to warn, by neglect of which he put himself in the wrong, and therefore upon his defense. Plaintiff was not under obligation to keep constant

watch to avoid danger, because he could act upon the assumption that defendant had done his duty.

2. It is earnestly contended that the evidence is insufficient to sustain the verdict, both because it fails to show that the defendant was at fault, and because it shows affirmatively that the plaintiff was guilty of contributory negligence; but this contention must be overruled. The evidence on the part of plaintiff shows: That, on arriving at the store after driving from his home, he entered by the front door; that, the day being cold, he was bundled up with wraps; that he proceeded along the main aisle or passageway to the end of the counter to reach the stove to warm himself; that he had made use of the stove before for this same purpose and had observed others do it; that he met the defendant at the end of the counter on his right, and shook hands with him; that defendant was standing immediately between the end of the counter and the cellarway and knew that the latter was open; that he did not warn the plaintiff; that that portion of the store was somewhat dark; that plaintiff could not see distinctly because he had come from the light into the darkness, and his eyes had not become accustomed to the change; that he passed on immediately to reach the stove and, not seeing the cellarway, fell into it. The defendant testified that, as he shook hands with the plaintiff, he warned him that the cellarway was in use and open, but that he paid no attention to him. The questions whether the defendant was guilty of negligence in failing to warn the plaintiff, or whether in fact he did warn him, and whether the plaintiff was himself guilty of contributory negligence, taking into consideration all the circumstances, were for the jury, and their finding thereon must be held conclusive.

Some contention is made that the evidence does not show that the plaintiff suffered any serious injury. His testimony tended to show that his shoulder was dislocated, and that he has since been disabled so far that he cannot attend to business of any character, and that his disability has been attended by a great deal of physical pain. It was a matter for the jury to deter-

mine what amount would reasonably compensate him for the condition brought about by the accident. The comparatively small amount of the verdict ($941.70) is not unreasonable.

3. At the close of plaintiff's case defendant's counsel moved the court to withdraw from the jury the question of damages for loss of earning capacity, for that no sufficient evidence, or any evidence, had been introduced upon which an estimate could be based. This motion was denied. It is argued that this action of the court prejudiced the defendant. There was in fact no evidence offered on this subject; the only statement made by the plaintiff being that he had not been able since the accident to pursue his occupation of farming and stockraising, but whatever work he had had done he had been compelled to hire a man to do it. Among the instructions we find the following: "You are instructed in this case that, the plaintiff having failed to produce any evidence in relation to the difference between his earning capacity prior to the accident and his earning capacity thereafter, you cannot consider his loss of earning capacity in reaching a verdict in this case." While it may be conceded that the motion should have been granted, the instruction quoted accomplished the purpose of the motion fully, and the defendant suffered no prejudice. If he was liable at all, the plaintiff was entitled to have damages awarded to him such as would fairly compensate him for all the detriment proximately caused by the injury suffered. (Revised Codes, sec. 6068.) One of the elements to be taken into consideration was the disability to pursue his usual vocation. This element does not include compensation for loss of earning capacity. In a given case the plaintiff's earning capacity may be so small as to be a negligible element in making up the estimate, yet the destruction of his capacity to pursue his established course of life is nevertheless a deprivation for which he is entitled to compensation.

4. Contention is made that the court erred in refusing to submit several instructions requested. Upon careful attention to the several assignments in this connection, we conclude that no prejudice was done. For example, request was made for the following: "(35) If you believe from the evidence in this case

that defendant maintained beneath his storeroom a cellar for the storage of goods used in the conduct of his business, and as a means of access to and exit from said cellar maintained the cellarway in question, and you further believe that the said cellarway was at the time of said accident open in the usual course of defendant's business, for the purpose of obtaining therefrom goods stored therein, then the existence of such opening cannot be considered of itself as negligence." There can be no doubt that it is not negligence *per se* for a property owner to maintain a cellarway, as did the defendant in this case, for use in conducting his business, even though, when open and unguarded, it might be considered a trap. (*Accousi* v. *Stowers Furniture Co.* (Tex. Civ. App.), 87 S. W. 861; *Swanson* v. *Boutell,* 95 Minn. 138, 103 N. W. 886; and cases heretofore cited.) In such case the owner is not an insurer of the safety of his customers. He is bound only to use reasonable care to keep his premises in such a condition that those invited there by him may not be unnecessarily exposed to danger (29 Cyc. 453; 1 Thompson on Negligence, sec. 970); and, when such an opening is in use, to warn his customers of this fact or to provide suitable guards for it. The court might very well have submitted the proposed instruction. It did instruct the jury, however, that the defendant was bound only to the use of ordinary care, and that if they found that he had discharged the obligation to warn the plaintiff that the cellarway was open and in use, as he shook hands with him upon his approach to the stove, they should find for the defendant. In view of this fact there seems to be no reason for inference that the jury could or did understand that the mere existence of the trapdoor convicted the defendant of negligence.

Let the judgment and order be affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

HELENA POWER TRANSMISSION CO., RESPONDENT, v. MCLEAN, APPELLANT.

(No. 2,602.)

(Submitted February 17, 1909. Decided March 1, 1909.)

[99 Pac. 1061.]

Eminent Domain—Erroneous and Conflicting Instructions—Indirect Damage—Hearsay Evidence.

Eminent Domain—Indirect Damage—Erroneous Instruction.

1. An instruction submitted to the jury in a condemnation proceeding, that in determining the damages resulting to the land remaining after the severance of the portion taken, they should consider "those elements of *damage*, and those only, that would be agreed upon as reasonable elements by a reasonable buyer and seller" willingly trading in the open market, was erroneous and so far meaningless that it could only operate to confuse the jury, since there is no question of *damage* involved between parties trading in land in the open market.

Same.

2. Substituting the word "value" for the word "damage," referred to in the above paragraph, the instruction would be none the less objectionable, inasmuch as it substitutes the judgment of the intending buyer and seller trading in the open market for that of the jury upon the question what, if any, less value the remaining portion of the land has in its detached condition than it had as a portion of the entire tract.

Same—Correct Instruction.

3. An instruction to the jury in a suit in eminent domain that, in determining the amount which defendant could recover, they should take into consideration every element of value which would be considered if parties were negotiating a voluntary sale, as between one who wants to purchase but is not compelled to do so, and one who wants to sell but is not compelled to sell, correctly stated the law.

Conflicting Instructions—New Trial.

4. The giving of conflicting instructions, the one correct and the other incorrect, upon a material point, will necessitate a reversal of the judgment and the granting of a new trial.

Eminent Domain—Offers to Sell—Inadmissible Evidence.

5. It was error to instruct the jury in a suit to acquire land by the exercise of eminent domain, that what similar land had been offered for was legitimate evidence of the market value of the land. What similar land may have been offered for by a person not a party to the suit is inadmissible, as hearsay. The offer is not made under oath and the person making it is not subject to cross-examination.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

CONDEMNATION PROCEEDINGS by the Helena Power Transmission Company against Mary H. McLean. From the judgment

of the district court on appeal from the commissioners' award, defendant appeals. Reversed and remanded.

Messrs. Galen & Mettler, for Appellant.

Mr. Wm. Wallace, Jr., Mr. John G. Brown, and *Mr. R. F. Gaines*, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The plaintiff seeks by the exercise of eminent domain to acquire certain lands belonging to defendant, McLean. There was an appeal to the district court from the award of the commissioners. The question of damages was tried to the court sitting with a jury. Upon the verdict returned, a judgment was rendered and entered, from which judgment the defendant, McLean, appeals.

There are many assignments of error; but, with one or two exceptions, it will not be necessary to consider them separately. At the instance of plaintiff the court gave instructions 7 and 9, as follows:

"(7) What similar land has actually been offered or sold for is, of course, legitimate evidence upon the question of its market value and a legitimate basis for a decision as to the market value of the land."

"(9) On the question of indirect damage, while this is ordinarily more difficult of determination than the actual value of the land, nevertheless it is governed by the same rules. All fanciful, exaggerated, and sentimental elements must be excluded. The amount must be just compensation for actual indirect damage that will really ensue—nothing more. You will consider those elements of damage, and those only, that would be agreed upon as reasonable elements by a reasonable buyer and seller, who were willingly trading in the open market; and on those elements you will confine yourselves to what you honestly believe the actual damage in money resulting therefrom will

be." And, at the request of defendant McLean, gave instruction 5, as follows:

"The court instructs you that, in determining the amount which the defendant in condemnation proceedings is entitled to recover, you should take into consideration every element of value which would be considered if parties were negotiating a voluntary sale, as between one who wants to purchase but is not compelled to purchase, and one who wants to sell but is not compelled to sell."

It is now insisted that instruction 9 is erroneous in any event, and that it is contradictory of instruction 5. In instruction 3 the court defined "indirect damage" as the detriment resulting to the portion of the land not taken by reason of its severance from the portion actually taken. In determining such detriment the court, in instruction 9, told the jury to consider those elements of damage, and those only, that would be agreed upon as reasonable elements by a reasonable buyer and seller, who are willingly trading in the open market. We confess our inability to understand the instruction, or to know therefrom what standard is sought to be established for the guidance of the jury. The common experience of mankind teaches that, when trading in land in the open market, there is not any question of damages presented at all. If it was meant by the instruction to say that the jury should confine themselves to those elements of value which would be agreed upon as reasonable by a reasonable buyer and seller in trading in the open market, the instructions could be understood, although it would be little less objectionable; but in its present form it is not only open to the charge that it is prejudicially erroneous, but it is so far meaningless that it could operate only to confound the jury.

The question now under consideration, which was before the jury for determination, is: What, if any, less value has the remaining portion of the land in its detached condition than it had as a portion of the entire tract? And this question is to be resolved by the application of the same rule for determining value as is applied in other cases. The solution of the ques-

tion does not depend upon an answer to the other inquiry, what elements of value would be agreed upon by a reasonable seller and buyer trading in the open market. It might be impossible to show what those elements are. An intending buyer might lay great stress upon one element of value, and the intending seller give that little or no consideration; and yet they might experience no difficulty whatever in reaching a mutually agreeable purchase price. In fact, they might never agree upon the particular elements of value, and still agree upon a sale. The instruction literally substitutes for the judgment of the jury the judgment of others. It is the province of the jury to consider the evidence touching every element of value which men, voluntarily trading in the open market, would consider. Instruction 5, above, correctly states the law. The two instructions are essentially contradictory, and that, too, upon a question which was paramount in the trial of this case. As we cannot say by which one of the two the jury were controlled, a new trial must be ordered. In *Sullivan* v. *Metropolitan Life Ins. Co.*, 35 Mont. 1, 88 Pac. 401, this court quoted with approval from *State* v. *Peel*, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169, the following: "Wherever instructions are upon a material point, the one correct and the other incorrect, this court will not presume that the jury followed the correct instruction, but will reverse the judgment and order a new trial."

The question before this jury was about as simple as any ever presented in court; and the result in this instance is fairly illustrative of the danger attending the giving of a large number of instructions, where four or five plain statements of law would be ample. New trials are frequently ordered on account of conflicting and contradictory instructions, and in almost every instance, the result could have been avoided if the trial court had confined the instructions to the matters necessary for the information of the jury in rendering a verdict.

Since a new trial must be had, attention is directed to instruction 7, above. There are not any objections made to this part of the charge, but the error in this instruction is apparent.

What land has been offered for by one not a party to the suit is not a criterion of the market value, and the evidence of such offer is inadmissible for the very obvious reason that the offer is not made by one under oath and subject to cross-examination. An offer to sell stands upon precisely the same footing as an offer to purchase, and evidence of either is objectionable upon the ground stated. In *Yellowstone Park R. R. Co.* v. *Bridger Coal Co.*, 34 Mont. 545, 115 Am. St. Rep. 546, 87 Pac. 963, in speaking of an attempt to introduce evidence of an offer of this character, this court said: "The offer was an attempt to get before the jury hearsay declarations of third parties as to value not supported by oath, without the right of cross-examination by the defendants. The right mode of proving value is to take the sworn opinions of those who are shown to be competent to give opinions on the subject, and let them be cross-examined as to the foundation of their opinions, their means of knowledge, and the motives prompting them. Furthermore, the value of such evidence depends upon the determination of so many collateral issues that it cannot be relied on with safety. * * * The reception of evidence of private offers to sell or purchase stands upon an entirely different footing from evidence of actual sales between individuals or by public auction, and also upon a different footing from bids made at auction sales. (*Young* v. *Atwood*, 5 Hun (N. Y.), 234.) The reception of this class of evidence would multiply the issues upon questions of damages to an extent not to be tolerated by courts aiming to practically administer justice between litigants. (*Keller* v. *Paine*, 34 Hun (N. Y.), 167.)"

We have examined the other specifications of error, but conclude that they are without merit.

The judgment is reversed, and a new trial ordered.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE SMITH, being disqualified, takes no part in the foregoing decision.

SHANDY, RESPONDENT, v. McDONALD ET AL., APPELLANTS.

(No. 2,604.)

(Submitted February 17, 1909. Decided March 1, 1909.)

[100 Pac. 203.]

Conversion—Pleadings—Motion to Strike—Refusal—Evidence—Admissibility — Harmless Error—Cross-examination—Record on Appeal — Certified Copies — Addition — Exemplary Damages—Complaint—Sufficiency.

Conversion—Pleadings—Motion to Strike—Refusal—Harmless Error.

1. Error in refusing to grant a motion, in an action in conversion, to strike out a portion of the replication which, referring to proceedings on attachment had in a justice's court, were said to contain allegations argumentative in character and charging defendants with gross wrongdoing, was harmless, where during the trial the entire record of the proceedings had in the justice's court was on plaintiff's motion excluded, and where the court in its instructions submitted only the issues presented by the complaint and the denials in the answer.

Same—Evidence—Admissibility—Harmless Error.

2. Where in an action in conversion the court charged the jury that, if they found for plaintiff, they should fix the value of two horses at the figure at which plaintiff bid them in at the judicial sale, together with interest, error in the admission of other evidence touching value was harmless.

Same—Cross-examination—Scope.

3. The court's action in refusing to permit defendants in an action for conversion to cross-examine plaintiff,—who on his examination in chief had testified only as to his claim of ownership and the value of the property,—about matters which had no tendency to throw light upon the things deposed to by plaintiff, was correct.

Same—Evidence—Review—Record.

4. Where the record of attachment proceedings had in a justice's court, offered in evidence in support of the justification pleaded in the answer to an action in conversion, was not incorporated in the bill of exceptions, the propriety of the court's ruling in excluding the evidence will not be reviewed on appeal.

Same—Evidence—Justification—Void Proceedings—Admissibility.

5. *Obiter:* Evidence of proceedings had in a justice's court on a suit in attachment is admissible in an action for conversion of the same property as tending to show good faith on the part of the defendants and to rebut any inference of malice, even though such proceedings were void.

Appeal—Record—Addition—Certified Copies.

6. After a transcript on appeal is filed in the supreme court, nothing may be added to it by such court in the shape of certified copies of papers at the request of the appellant. The review must be had upon the record as made in the district court.

Conversion—Exemplary Damages—Complaint—Sufficiency.

7. The complaint in an action for damages for a conversion which alleged, *inter alia*, that defendants "did unlawfully, maliciously, fraudulently and oppressively take and carry away" the property in controversy, and refused restitution of the same after repeated demands, was broad enough to warrant inquiry into the motives and behavior of defendants, and to justify the giving of an instruction that exemplary damages might be awarded for oppressively, fraudulently or maliciously withholding the chattels after demand.

Same—Excessive Damages.

8. Where it is impossible to determine what portion of the damages allowed in an action for conversion was for exemplary damages, and where, after adding to the value of the property the amount expended by plaintiff in pursuit of it, there remained but a small margin for punitive damages, the verdict may not be said to be excessive, even though it was in excess of the value of the property as fixed by all witnesses except the plaintiff.

Same—Exemplary Damages—Jury—Discretion.

9. The allowance of exemplary damages in an action for a conversion lies within the discretion of the jury under the evidence adduced.

Appeal from District Court, Missoula County; F. C. Webster, Judge.

ACTION for conversion by Earl Shandy against F. J. McDonald, sheriff, and J. A. Featherman and another, copartners under the firm name of J. A. & J. B. Featherman. From a judgment for plaintiff, and from an order denying them a new trial, defendants appealed. Affirmed.

Mr. D. M. Durfee, Messrs. Marshall & Stiff, and *Mr. Josiah Shull*, for Appellants.

The statute requiring a justice of the peace to keep a docket and enter certain things, therein specified, in the docket, is directory, and the justice, after jurisdiction has once been acquired, acts ministerially. Where a justice has once acquired jurisdiction of the person and of the subject matter, a failure to keep any docket at all would not invalidate the judgment. (*Hickey* v. *Hinsdale*, 8 Mich. 267, 77 Am. Dec. 451.) The justice of the peace having charge and control of his docket may change it at any time so as to make it conform to the facts. (*Ex parte Sternes*, 77 Cal. 156, 11 Am. St. Rep. 251, 19 Pac. 275; *Ex parte Ah Men*, 77 Cal. 198, 11 Am. St. Rep. 263, 19 Pac. 380; *Lynch* v. *Kelly*, 41 Cal. 232; *Knapp* v. *King*, 6 Or.

243; *In re Weber*, 4 N. D. 119, 59 N. W. 523, 28 L. R. A. 639; *Walrod* v. *Shuler*, 2 N. Y. 134.) A justice of the peace acts ministerially, and not judicially, in making up and completing the record of cases tried before him, and may do so at any time, even after his commission has expired. (*Martin* v. *Pifer*, 96 Ind. 245; *Baker* v. *Brintnall*, 52 Barb. (N. Y.) 188.)

A judgment is conclusive upon a collateral attack, and no imperfection or irregularity renders it absolutely void. (*Derr* v. *Wilson*, 84 Ky. 14.) "Recitals in records of judgment are conclusive until reversed by appeal, or set aside in a direct proceeding." (*Ex parte Stern, supra; Goodwin* v. *Sims*, 86 Ala. 102, 11 Am. St. Rep. 21, 5 South. 587; *Ex parte Ah Men, supra; Gage* v. *Stokes*, 125 Ill. 40, 16 N. E. 925; *Robinson* v. *Fries*, 22 Fla. 303; *Peck* v. *McLean*, 36 Minn. 288, 1 Am. St. Rep. 665, 30 N. W. 759.) A judgment is conclusive on all defenses which could have been presented by the exercise of due diligence. (*Hobby* v. *Bunch*, 83 Ga. 1, 20 Am. St. Rep. 301, 10 S. E. 113, and note.)

Messrs. Hall & Patterson, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for damages for a conversion. The property in controversy consisted of horses, mares, harness, saddles, and a buggy. After the usual averments of ownership and possession by plaintiff and of the value of the property, fixed at $1,600, the complaint alleges: That on July 19, 1905, the plaintiff, being in lawful possession thereof together with another large team and a heavy wagon and harness, was on his way to fulfill a teaming contract into which he had entered, requiring the use of all of said property; that defendants, well knowing that plaintiff was not indebted to them in any way, that they had no interest in the property or any right to take or detain it, and also that plaintiff was required to use it in order to fulfill his said contract, which would yield to him a profit of $500 within sixty

days, fraudulently and maliciously to obtain the use of it for themselves, and to deprive the plaintiff of it and put him to great inconvenience, expense and loss of time, maliciously, fraudulently and oppressively, against the wishes and protest of plaintiff, took and carried it away, converting and disposing of it to their own use, to the damage of plaintiff in the sum of $3,000. It is further alleged that plaintiff spent thirty days in the pursuit of his property, besides $300 in money, and that the time so spent was worth $500. It is also further alleged that at various times between July 20 and August 20, 1905, plaintiff demanded the return to him of his said property, but that his demand was in each instance refused, except that on August 3 there were returned to him the large team and the heavy wagon and harness. Judgment is demanded for $3,800 and costs of the action.

The answer contains specific denials of the material allegations of the complaint, except that it is admitted that the property was of the value of $300. It then proceeds to justify the taking under an attachment alleged to have been issued in an action brought by the defendants, J. A. & J. B. Featherman, as copartners, against J. N. Shandy & Sons, also a copartnership, of which the plaintiff was a member, in a justice's court in Granite county, in which judgment was on July 24, 1905, rendered in favor of J. A. & J. B. Featherman, and under an execution issued thereon on the same day to the defendant McDonald, who, as sheriff of Granite county, sold the property to satisfy the judgment. Upon this justification there was issue by reply, denying each allegation as to the bringing of the action, the issuance and service of process therein, the entry of judgment, the existence of the copartnership of J. N. Shandy & Sons, and the connection of plaintiff therewith. It then proceeds at length, by way of special allegations, to attack the judgment on the ground that it was procured by fraud and collusion between the plaintiffs in that action and one G. W. Commons, a justice of the peace, without service of process upon the plaintiff herein and without appearance by him in the ac-

tion. It is sufficient to say of this portion of the pleading that it alleges no fact tending to impeach the judgment which might not have been proved under the preceding denials joining issue upon the justification alleged in the answer. The defendants made a motion to strike out all of it except the denials, on the ground that the matters alleged were immaterial, irrelevant and redundant. The motion was denied. The trial resulted in a verdict and judgment for plaintiff for $1,000. Defendants have appealed from the judgment and an order denying their motion for a new trial.

1. The first contention made is that the defendants were prejudiced by the refusal of the court to strike out the portion of the replication referred to. The argument is that, since the jury were allowed to have with them during their deliberations the pleadings in the case, containing, as they do, many allegations argumentative in character, charging the defendants with gross wrongdoing, they had submitted to them illegitimate argument, which doubtless influenced them in reaching their conclusion upon the evidence. As we shall notice hereafter, however, upon objection of plaintiff that the papers embodying the proceedings before the justice failed to show that he had jurisdiction of the cause or to render any judgment therein, the entire record was excluded; hence the only questions left to the jury to try were whether the defendants took and converted the property, and what was its value. The truth or falsity of the allegations touching the judgment was not at issue. The instructions submitted only the issues presented by the complaint and the denials in the answer. Under these conditions the objectionable matters were in fact withdrawn from the consideration of the jury, and, though the court erred in denying the motion, the error could not have resulted in prejudice. The judgment may not be reversed because of such error. (Revised Codes, sec. 6593.)

2. The court permitted the plaintiff to introduce in evidence a photograph of one of the horses in controversy, taken a few days before the trial. This was objected to as immaterial. The evident purpose was to assist the jury in reaching a conclusion

as to the value of this horse upon the testimony of the plaintiff; his testimony being the only other evidence offered by him on this subject. At one time during his examination he fixed this value at $300, and at another at $500. Subsequently it was developed by his testimony, and that of other witnesses, that when the sale took place he had employed one of defendants' witnesses to purchase this and another one of the animals for him, agreeing to pay the witness $5 for his services, and that he secured both at a cost of $130. In this connection the court instructed the jury that, if they found for the plaintiff, in arriving at the amount of their verdict they must fix the value of these two animals at $130, the sum it cost the plaintiff to regain them, and add interest at the legal rate from the date of the sale up to the date of the trial. This instruction excluded from the consideration of the jury all other evidence as to the value of these animals. Therefore, it is not necessary to express an opinion as to the propriety of this ruling. Whether the photograph was material or not at the time it was offered and admitted, the finding of the jury could not have been controlled or affected by it in the least.

During his cross-examination the plaintiff, after stating that, when a deputy sheriff took the property from his possession, he (the deputy) handed him two little papers, but that, as he could not read or write, he did not take them or have anything to do with them, said: "This was on the 19th. There was a trial before Judge Commons at Drummond after that about three days." He was then asked: "How did you know there was a trial?" Upon objection by counsel he was not permitted to answer. It is said that the ruling was an improper restriction of the right of cross-examination. This right extends not only to the matters of fact testified to by the witnesses in chief, but also to all facts and circumstances directly or indirectly connected therewith, which tend to enlighten the jury upon the question at issue. (*Kipp* v. *Silverman*, 25 Mont. 296, 64 Pac. 884; Revised Codes, sec. 8021.) But the questioner may not, under the guise of cross-examination, go into the merits of his cause of action or

defense. (*Borden* v. *Lynch*, 34 Mont. 503, 87 Pac. 609.) If the evidence sought had any materiality, it would have tended to reflect upon defendants' justification under the proceedings in the justice's court, and not to throw light on plaintiff's claim or the value of the property in controversy, the only matter upon which plaintiff had testified. There was no error in the ruling.

The most serious contention arises upon the action of the court in excluding from the evidence the record of the proceedings had in the justice's court, offered in support of the justification pleaded in the answer. We are compelled to forego consideration of it, however, for the reason that the transcript contains none of these proceedings, and it is impossible to determine whether the action was properly instituted and resulted in a judgment against the plaintiff as a member of the copartnership of J. N. Shandy & Sons, or not. When the copy of the justice's docket and the files in the case were offered, objection was made, among others, that it did not appear therefrom that an action had been instituted by the filing of a complaint with the justice. Since an action can be instituted only by the filing of a formal complaint, or, what is its equivalent, by the filing of a copy of the account, bill, bond or instrument upon which the action is brought, with a statement of the amount due thereon (Revised Codes, sec. 6993), the justice could not issue an attachment or proceed to judgment without this prerequisite. In the absence from the bill of exceptions of any copy of his docket and the files in the case, this court has nothing before it by which it can determine the propriety of the court's action in excluding the evidence. Even if, as counsel insist, it was competent to supplement the justice's docket by oral evidence of the fact that a complaint was filed, which they offered to do, yet, since the papers are not before us, we can only guess what legal effect should be assigned to them. The rule has frequently been announced by this court that it will not review the action of the trial court upon the exclusion of evidence, unless it is apparent from the question put to the witness what the evidence sought to be elicited is, or unless an offer of proof is made sufficiently ex-

plicit and comprehensive to make this appear, and the offered evidence is incorporated in the bill of exceptions. (*Haupt* v. *Simington*, 27 Mont. 480, 94 Am. St. Rep. 839, 71 Pac. 672; *Tague* v. *John Caplice Co.*, 28 Mont. 51, 72 Pac. 297; *First Nat. Bank* v. *Carroll*, 35 Mont. 302, 88 Pac. 1012.) The rule laid down in these cases is applicable here, and precludes this court from looking into the merits of this contention.

We are inclined to the opinion, though the point is not made by counsel, that even if the proceedings in the justice's court were void, they were nevertheless admissible as tending to show good faith on the part of the defendants, and as rebutting any inference of malice. (*Dorsey* v. *Manlove*, 14 Cal. 553.)

After the transcript was filed in this court, counsel for defendants presented certified copies of all these proceedings and asked to have them considered a part of the record. This court has no power to add anything to the record made up by the district court. The review here must be upon the record as made, and upon which the order denying the motion for a new trial was predicated. (*Robinson* v. *Helena L. & Ry. Co., ante*, p. 222, 99 Pac. 837.)

Other errors are assigned upon the court's rulings upon the admission and exclusion of evidence. In some instances no exception was saved to the ruling, and in others the contentions are not of sufficient merit to require special notice. For illustration, defendants contend that they should have been permitted to supplement the recitals in the justice's docket by oral evidence showing that a complaint was filed, that a trial was regularly had after appearance and answer of defendants, and that judgment was thereupon rendered in conformity with the requirements of the statute. In the absence of the record of the proceedings, however, it would be a matter of speculation to undertake a review of the court's action in rejecting the evidence.

3. As a part of its charge, the court instructed the jury as follows: "The court instructs the jury that if they believe from the evidence that the defendants in instituting the action and suing out the attachment and levying on the property mentioned

and described in the complaint, or in holding the same after demand, were not moved to so do by malicious or oppressive motives, then all that the plaintiff can recover in this action is such damage as you may believe from all the evidence in the case will compensate plaintiff for the loss that he sustained, which is the reasonable market value of the property taken and such actual expense as you may believe the plaintiff to have incurred in pursuing and trying to regain possession of the property up to the time of the institution of this action." This paragraph was requested by the defendants, but, as requested, did not contain the clause "or in holding the same after demand." The court gave it after inserting this modification. Another paragraph embodied the provisions of the statute (Revised Codes, sec. 6047) that, "in any action for a breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant."

The contention is made that the complaint charges only that the taking was actuated by malice and fraud, and that the court in giving the instruction authorized the jury to consider an element of damage not covered by the pleading. This contention involves the assumption that, if the allegations of the complaint are broad enough, any malicious, fraudulent, or oppressive conduct on the part of the defendants in withholding the property after demand for its return should have been considered by the jury in determining whether the plaintiff was entitled to recover exemplary damages. This assumption seems to be proper. (Sedgwick on Damages, sec. 374; *Taylor* v. *Morgan*, 3 Watts (Pa.), 333; *Dennis* v. *Barber*, 6 Serg. & R. (Pa.) 420.) In our opinion the complaint is broad enough in its scope to warrant inquiry into the motives and behavior of the defendants not only at the time of taking, but also after demand made, for the allegation is: "That said defendants, well knowing that this plaintiff was in no manner indebted to them or either of them, and that they and neither of them had any right or authority to

in any manner take or detain any of the above-described property of plaintiff, but well knowing that plaintiff required said goods and chattels to perform said contract which would give plaintiff a profit of $500, within sixty days, and fraudulently and maliciously to obtain plaintiff's said property for their own use and benefit, and to oppressively deprive plaintiff thereof, knowing that such taking and detention would cause plaintiff to be put to great inconvenience, expense and loss of time, and deprive him of the means of performing said contract * * * did * * * unlawfully, maliciously, fraudulently, and oppressively take and carry away said horses, goods, and chattels, * * * " This statement is supplemented by allegations of repeated demand for restitution, which were all refused. There is no merit in the contention.

4. Some contention is made that the verdict is not justified by the evidence, in that it is much in excess of the value of the property as fixed by all witnesses except the plaintiff, and that the amount found cannot be based upon the statement of any one of the witnesses. Upon examination of the evidence we find this statement to be true; but it is impossible to determine therefrom how much the jury awarded to the plaintiff in the way of exemplary damages. If we take the highest value fixed for the property by the witnesses for the defendants, and add to it the amount of money the plaintiff spent in pursuit of his property prior to the bringing of the action, about which there seems to be no dispute, this makes a sum which leaves a comparatively small margin for exemplary damages, if in fact the jury awarded such. At best we cannot arrive at any other conclusion than that the verdict is well within the purview of the evidence, and, since the allowance of exemplary damages was within the discretion of the jury, we do not think that we should disturb their verdict.

Let the judgment and order be affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

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FORSELL, RESPONDENT, v. PITTSBURGH & MONTANA COPPER CO., APPELLANT.

(No. 2,612.)

(Submitted February 19, 1909. Decided March 1, 1909.)

[100 Pac. 218.]

Personal Injuries—Master and Servant—Mines—Causes of Action—Misjoinder—Waiver—Election—Complaint—Evidence—Inadmissibility—Variance—Failure of Proof.

Pleadings—Causes of Action—Misjoinder—Waiver.

1. The objection that there is a misjoinder of causes of action must be made by answer or demurrer; if not so made, it is deemed waived.

Same—Election.

2. Where the objection to a misjoinder of causes of action was waived, an order refusing to compel plaintiff to elect on which cause of action he would proceed was proper.

Personal Injuries—Master and Servant—Complaint—Evidence—Inadmissibility.

3. Where, in an action against a mining company, plaintiff employee alleged that his injury was due to defendant's negligence in permitting a brake on a hoisting engine to be in a defective condition, so that it would not perform the duty assigned it, it was error to admit evidence that the brake was too light, that the engine was defective, that the exhaust from the engine was not properly connected, and of the effect of the back pressure of steam. The plaintiff must stand upon the cause of action stated in the complaint.

Same.

4. It was also error to admit evidence, under the complaint referred to in the foregoing paragraph, that a kind of brake different from the one used should have been employed, since no charge was made that defendant was negligent in selecting the one employed, nor that the one used was not adapted to the work required of it.

Same—Concurrent Negligence—Failure of Proof.

5. The complaint in a personal injury action charged that the defendant mining company negligently permitted a brake on a hoisting engine to become defective, and that such negligence, concurring with the negligence of the engineer in charge of the engine, "both acting together, proximately caused the injury," and that but for such concurrent negligence the accident would not have occurred. At the close of plaintiff's case, the court granted a nonsuit as to the defendant engineer, thus determining as a matter of law that he was not guilty of actionable negligence. *Held*, that plaintiff was required to prove his case as made in the complaint, and that, since he failed to show concurrent negligence, there was a failure of proof, which prevented recovery.

New Trial—Grounds—Failure of Proof—Variance.

6. While technically there is a distinction between "variance" and "failure of proof," yet where the term "failure of proof" is used as

the equivalent of "insufficiency of evidence" there may not be any distinction, and where the evidence tends to establish a cause of action entirely different from that alleged in the complaint, there is such a variance as amounts to a failure of proof, and the question may be presented on a motion for a new trial under a specification of insufficiency of the evidence to justify the verdict.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by Alfred Forsell against the Pittsburgh & Montana Copper Company. From a judgment for plaintiff, and an order denying it a new trial, defendant appeals. Reversed and remanded.

Messrs. Kremer, Sanders & Kremer, for Appellant.

A party can recover only on the cause of action alleged or proved. (*Abromovitz* v. *Markowitz,* 58 Misc. Rep. 231, 108 N. Y. Supp. 1044; *Pierce* v. *Great Falls & Canada Ry. Co.,* 22 Mont. 445, 56 Pac. 867.) Plaintiff must adopt a theory and prove his theory. (*Hawes* v. *Warren,* 119 Fed. 978.) He must recover upon a definite theory shown in his complaint, and cannot proceed on one theory and recover on a different one. (*Cool* v. *McDill,* 38 Ind. App. 621, 78 N. E. 679; *Feder* v. *Field,* 117 Ind. 386, 20 N. E. 129.) The wrong proven must be the wrong alleged. (*Hennessy* v. *Anostock,* 19 Pa. Sup. Ct. 644.) Plaintiff cannot recover upon proof establishing a different cause of action from that he has alleged, even though the cause of action established be a good one. (*Soden* v. *Murphy,* 42 Colo. 352, 94 Pac. 353.) The proof must correspond with the allegations. (*Lovingston* v. *Adkins,* 232 Ill. 510, 83 N. E. 1043.) Where plaintiff specifically alleges in his petition a given state of facts as constitutive of his cause of action, he must recover on such facts and no others. (*Haynor* v. *Excelsior Springs etc. Water Co.,* 129 Mo. App. 691, 108 S. W. 580; *Bryant Lumber Co.* v. *Clifton,* 85 Ark. 322, 108 S. W. 216.) "A variance that amounts to a failure of proof is not waived by failure to take advantage of it at the trial." (*Bank of Springfield* v. *First Nat. Bank of Springfield,* 30 Mo. App. 271.) Where the evidence

sustains no cause of action stated, or attempted to be stated, in the petition, an entire failure of proof, and not a mere variance, results. (*Wesby* v. *Bowers*, 58 Mo. App. 419; *Louisville etc. Ry. Co.* v. *Renicker*, 8 Ind. App. 404, 35 N. E. 1047; *Terry* v. *Shively*, 64 Ind. 106; *Thomas* v. *Dale*, 86 Ind. 435; *Cleveland etc. Ry. Co.* v. *Wynant*, 100 Ind. 160; *Bremmerman* v. *Jennings*, 101 Ind. 253; *Hasselman* v. *Carroll*, 102 Ind. 153, 26 N. E. 202; *Chicago etc. Ry. Co.* v. *Burger*, 124 Ind. 275, 24 N. E. 981.) A motion for a nonsuit may be sustained for a substantial variance between the declaration and the evidence. If the plaintiff has not proved the supposed cause of action substantially as alleged, he has no case to submit to the jury. (*Hart* v. *Chesley*, 18 N. H. 373; 2 Current Law, p. 1241; *Plass* v. *Weil*, 39 Misc. Rep. 777, 81 N. Y. Supp. 299; *Moran* v. *Kent*, 84 N. Y. Supp. 17, 87 App. Div. 610.)

In an action against several defendants as joint tort-feasors, failure to prove joint liability is failure to prove the cause of action alleged. (*Livesay* v. *First Nat. Bank*, 36 Colo. 526, 118 Am. St. Rep. 120, 6 L. R. A., n. s., 598, 86 Pac. 102; see, also, *Dussoulas* v. *Thomas* (Del.), 65 Atl. 590; *Glore* v. *Scroggins*, 124 Ga. 922, 53 S. E. 690; *Davis* v. *Caswell*, 50 Me. 294.) Where parties are charged with concurrent acts of negligence to justify a recovery, it must be shown that each party concurred in the negligent acts or that their negligent acts concurred. (*Waters-Pierce Oil Co.* v. *Van Elderen*, 137 Fed. 563, 70 C. C. A. 255; *Wormsdorf* v. *Detroit City Ry. Co.*, 75 Mich. 472, 13 Am. St. Rep. 453, 42 N. W. 1002; *Thompson* v. *Flint etc. R. R. Co.*, 57 Mich. 300, 23 N. W. 820.) Where plaintiff alleges that his damage was the result of specific acts of negligence, he cannot recover for negligence outside such acts, since he must stand on the cause of action stated. (*Pierce* v. *Great Falls & C. Ry. Co.*, 22 Mont. 445, 56 Pac. 867; *Price* v. *St. Louis etc. Ry. Co.*, 72 Mo. 414; *Schneider* v. *Missouri Pac. Ry. Co.*, 75 Mo. 295; *Atchison* v. *Chicago etc. Ry. Co.*, 80 Mo. 213; *Straight* v. *Odell*, 13 Ill. App. 232; *Toledo etc. Ry. Co.* v. *Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Shanke* v. *United States Heater Co.*, 125 Mich. 346,

84 N. W. 283; *Thomas* v. *Louisville etc. Co.*, 18 Ky. Law Rep. 164, 35 S. W. 910; *Telle* v. *Leavenworth etc. Co.*, 50 Kan. 455, 31 Pac. 1076; *Galveston, H. & S. A. Ry. Co.* v. *Herring* (Tex. Civ. App.), 36 S. W. 129; *St. Louis & S. F. Ry. Co.* v. *Fudge*, 39 Kan. 543, 18 Pac. 720; *Atchison etc. Ry. Co.* v. *Irwin*, 35 Kan. 286, 10 Pac. 820.)

Messrs. Maury & Templeman, and *Messrs. Breen & Hogevoll*, for Respondent.

When machinery is in such a condition that it starts automatically, or slips as in the case at bar, this is negligence, and the master is liable. (Labatt on Master and Servant, sec. 95, p. 229.) How much more in the case at bar, where the master did not only allow it to fall into such a condition, but actually had caused such a condition to remain from the date the machinery was placed there and until after the injury to Forsell. The courts have often held that the fact that certain machinery is out of repair before the accident, and also after the accident, this in itself is sufficient to go to the jury. (*Brunger* v. *Pioneer Paper Co.*, 6 Cal. App. 691, 92 Pac. 1043.)

There was no demurrer for misjoinder of causes of action, and therefore there could be no compulsion of election. (2 Abbott's Trial Brief, pp. 1260, 1265.)

It is a general rule of pleading that only the ultimate facts can be set out in the complaint. The ultimate fact in the case at bar was the defective brakes. Whatever caused these brakes to be defective was a matter of evidence to make up the proof, and plaintiff had a right to introduce any evidence as to what caused the brakes to be defective; and, also, to show other concurrent negligent acts of the defendant, if these acts contributed to the main cause of the accident. (*Freeman* v. *Sand Coulee Coal Co.*, 25 Mont. 194, 64 Pac. 347; Thompson on Negligence, secs. 3857, 3861.) As to the right of plaintiff to recover notwithstanding concurrent acts of negligence are charged, see *Ebsary* v. *Chicago City Ry. Co.*, cited by appellant; *Meisner* v. *Dillon*, 29 Mont. 116, 74 Pac. 130; 29 Cyc. 640, 609, 565.

In the case of *Blanton* v. *Dold*, 109 Mo. 64, 18 S. W. 1149, it is held that if machinery starts automatically, this is *prima facie* evidence, and the doctrine of *res ipsa loquitur* applies.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an action for damages for personal injuries. The complaint alleges: That the plaintiff was employed by defendant company and directed to work near the 1,200-foot level in a shaft in the Pittsmont mine; that defendant John Medlin was a stationary engineer, employed by the defendant company to operate a hoisting engine by means of which a heavy cage was raised and lowered in the shaft. The complaint then alleges: "The defendant copper company disregarded and failed in its duty of using ordinary care to make the said place where plaintiff was at work reasonably safe, and it negligently permitted the brakes on said engine to be defective and in such condition that no man could clamp them tight enough to prevent the cage from slipping down the shaft when the cage would be placed at rest by said engineer." The complaint further describes the injuries received by the plaintiff. The complaint also contains a second cause of action, based upon the alleged negligence of defendant Medlin only. At the conclusion of plaintiff's case, each defendant interposed a motion for a nonsuit. The motion of the defendant Medlin was sustained, and that of the defendant company was overruled. The plaintiff recovered judgment against the defendant copper company, and from the judgment and an order denying it a new trial the company appeals.

1. Since the second cause of action is predicated upon the alleged negligence of Medlin only, the order granting a nonsuit as to him withdrew that cause of action, and it is not before us now. Whether there was a misjoinder of causes of action we will not determine. There does not appear to have been any objection made by answer or demurrer to the complaint on that ground, and, unless the objection is so taken, it is deemed waived. (Revised Codes, sec. 6539.)

2. The defendants requested the trial court to compel the plaintiff to elect upon which cause of action he would proceed to trial. This was denied, and properly. In 2 Abbott's Trial Briefs (Pleading), 1260, the rule is stated as follows: "The objection to a misjoinder of causes of action which would have sustained a demurrer is waived by not demurring, and therefore not ground for compelling plaintiff to elect at the trial."

3. By discharging Medlin on his motion for a nonsuit, the trial court determined, as a matter of law, that he was not shown to be guilty of actionable negligence. In order to recover at all, it was necessary for the plaintiff to rely upon the alleged negligence of the defendant company as charged in his complaint. It will be observed from that portion of the complaint quoted above that the negligence of the defendant company is said to consist in its failure to use ordinary care to make the place where plaintiff was at work reasonably safe; but there was not any evidence offered in support of this allegation, except in so far as the evidence tending to support the second ground of negligence may be said to support it.

As a second ground of negligence it is alleged that the defendant company "negligently permitted the brakes on said engine to be defective and in such condition that no man could clamp them tight enough to prevent the cage from slipping down the shaft when the cage would be placed at rest by the engineer." These allegations were all put in issue by the answer. Early in the trial a question arose over the admissibility of evidence, and the court ruled that the plaintiff might introduce evidence tending to show the condition of the engine at the time it was placed in position, that it was too small, that the brakes would not hold, and any defects in the brakes caused by lapse of time or the failure of defendant company to keep them in repair. Under this ruling the plaintiff, over the objection of the defendants, introduced evidence tending to show that the brake used was too light for the work imposed upon it, that the hoisting engine was defective, that the exhaust from the engine was not properly connected, and the effect of the back pressure of

steam. In admitting this evidence we think the trial court erred. As we construe the complaint and the evidence offered in support of it, the only contention is over the charge against the defendant company that it negligently permitted the brake to be in a defective condition so that it would not perform the duty assigned it. In *Pierce* v. *Great Falls & C. Ry. Co.*, 22 Mont. 445, 56 Pac. 867, the complaint charged the railway company with negligence in the following particulars: The coach was improperly equipped; the trainmen were incompetent; the track was unsafe; the train and track were not inspected. The allegations of negligence were denied, and the answer alleged that the wreck was caused by an act of God—that the train was blown from the track by a violent windstorm. The plaintiff, being unable to sustain the allegations of her complaint by proof, then sought to show that the railway company was negligent in running its train through the windstorm. Speaking of this attempt this court said: "In the case at bar, however, the plaintiff, instead of stating generally the failure of the defendant to exercise care in the discharge of its duties, alleged in her pleadings the particulars in which the negligence of defendant consisted. She could not recover for negligence in any other respect, for a plaintiff must stand upon the cause of action stated in the complaint." That this rule is correct would seem to be too plain to require argument or citation of authorities. Our Code (Revised Codes, sec. 6532), requires the complaint to contain a statement of the facts constituting the cause of action. "It would be folly to require the plaintiff to state his cause of action, and the defendant disclose his grounds of defense, if in the trial either or both might abandon such grounds and recover upon others which are substantially different from those alleged." (*Boardman* v. *Griffin*, 52 Ind. 101; 2 Abbott's Trial Briefs (Pleading), 1720; White's Personal Injuries in Mines, sec. 130; 6 Thompson's Commentaries on the Law of Negligence, 7471; 1 Elliott on Evidence, sec. 204; 14 Ency. of Pl. & Pr. 342; *Ebsary* v. *Chicago City Ry. Co.*, 164 Ill. 518, 45 N. E. 1017; *Telle* v. *Leavenworth R. T. Ry. Co.*, 50 Kan. 455,

31 Pac. 1076; *Arcade File Works* v. *Juteau,* 15 Ind. App. 460, 40 N. E. 818, 44 N. E. 326.)

4. A witness was permitted to testify, over the objection of the defendant company, in effect, that instead of a band brake, such as was used, a post brake should have been employed. This was error also. The complaint does not count upon the negligence of the company in selecting the particular character of brake, nor does it allege that a band brake is not adapted to the work required by the defendant to be done by the brake in question. (*Galveston, H. & S. A. Ry. Co.* v. *English* (Tex. Civ. App.), 59 S. W. 626.)

5. But it is said that there is a fatal variance between the allegations of the complaint and the proof, which amounts to a failure of proof. After setting forth the alleged negligent acts of the defendant company above, the complaint continues: "Now such negligent acts of the defendant copper company were a proximate cause of the hereinafter set out injury to plaintiff, and but for such negligent acts the injury would not have taken place, but there was another proximate cause of the injury; that is to say, the negligent act of John Medlin hereinafter set out, and but for this the injury would not have happened. The said negligent act of the defendant copper company concurred with the negligent act of John Medlin, the engineer, and both acting together proximately caused the injury to plaintiff." This allegation is only susceptible of one construction, viz., that it required the concurrent negligence of both the company and Medlin to produce the injury, and without the negligence of either the injury would not have happened. If, then, the injury would not have happened but for the negligence of Medlin, the negligence of the company alone was not sufficient to produce it. The court having found that Medlin was not negligent, then, no matter what negligence is shown on the part of the company, the plaintiff could not recover against the company under this allegation of his complaint.

In *St. Louis, B. & S. Co.* v. *Hopkins,* 100 Ill. App. 567, it is said: "While it is ordinarily true that actions against tort-

feasors may be either joint or several, that a suit may be maintained against one, any, or all, and that there may be a recovery against one or more of the defendants, and a failure to recover as to others in the same suit, still all this does not relieve a plaintiff from the burden of proving the negligence set up in his declaration substantially as charged, as to all against whom he asks judgment. If the pleader, though needlessly, describe the tort and the means adopted in effecting it with minuteness and particularity, and the proof substantially vary from the statement, there will be a fatal variance. (*City of Bloomington* v. *Goodrich*, 88 Ill. 558; *Ebsary* v. *Chicago City Ry. Co.*, 164 Ill. 518, 45 N. E. 1017.) This question was before this court in much the same form as here, in *Cleveland etc. Ry. Co.* v. *Eggmann*, 71 Ill. App. 42. In that case, by Mr. Justice Worthington, we said, in substance: 'Appellee might have sued appellant separately and recovered if the proof warranted it, whether the negligence of another concurred or did not concur; but instead of doing this or suing both, and charging a common negligence, which he might have done, and recovered against both, or one or neither, according to the proof, he elected to sue both, charging concurrent negligence. The verdict of the jury finding the co-defendant not guilty establishes the fact that there was not concurrent negligence., i. e., that the negligence charged was not proven. There could be no concurrent negligence unless both defendants were guilty.' ''

In 29 Cyc. 587, the rule is stated as follows: "If the negligence alleged consisted of several acts of negligence, plaintiff need not prove every act alleged if the injury resulted from those proved, except that where it was alleged that the negligence consisted of several concurring acts all of the acts must be proved. If negligence charged is the joint negligence of two defendants, it must be proved as charged."

In *Cleveland etc. Ry. Co.* v. *Eggmann*, 71 Ill. App. 42, the complaint set forth the alleged negligent act of each defendant, and then alleged that these acts directly concurred in causing the death of plaintiff's intestate. The jury found that one of

the defendants was not negligent, and on appeal by the other the court said: "Appellee might have sued appellant separately, and, if the proof warranted, recovered against appellant, whether the negligence of the Toledo, St. Louis & Kansas City Railroad concurred, or did not concur. He elected to sue both defendants, charging concurrent negligence. The jury by special findings said that the Toledo, St. Louis & Kansas City Road was not negligent as charged, and that appellant was. In other words, by their verdict and findings, the jury said that there was not the concurrent negligence charged in the declaration, but that the sole cause of the accident was the negligence of appellant. It is a rule in pleading, subject to no exceptions, that a party must recover, if at all, on and according to the case he has made for himself in his declaration. He is not permitted to make one case by his allegations and recover on a different case made by the proof."

In *Wormsdorf v. Detroit City Ry. Co.*, 75 Mich. 472, 13 Am. St. Rep. 453, 42 N. W. 1000, the complaint charged that the injury resulted from the concurrence of four different acts of negligence. In reversing the judgment the supreme court said: "The court charged the jury that there were four grounds of recovery, and that they might all stand or fall separately, and that, if they had satisfied the jury that the accident was caused by the negligence of the defendant upon either of the grounds stated, although they had failed in respect to the other three grounds, the plaintiff was entitled to recover. We do not think the pleadings will support this portion of the charge. The declaration alleges wherein the defendants were negligent, and then alleges that by means of the premises aforesaid, which premises were the concurring acts of negligence set out, the accident occurred. There are four several acts of negligence alleged, but neither, alone, is said to have caused the injury, but the combined acts are alleged to have done so. If the breaking of the connecting rod was purely accidental and occurred without the fault or neglect of defendant, and the car rushed upon the horses upon the descending grade, and the defendant

was not at fault in the team running away, I do not think the declaration is so drawn as to place the company in fault for the sole neglect of the driver of the west-bound car to stop and invite his passengers to alight."

If, then, the negligence of the company alone would not have produced the injury, there is simply a failure of proof, since there is not any showing of concurring negligence; or, in other words, the evidence is insufficient to support the verdict.

6. In denying the motion for a new trial, the district judge said: "It is true that the negligence proven in the case is not the negligence alleged; but, by failing to raise the question of variance at the trial, defendant waived it, and cannot raise it now." And respondent asserts that doctrine in this court. Speaking technically, there is a well-defined distinction between "variance" and "failure of proof"; but in the sense in which the terms "failure of proof" are constantly used—that is, as the equivalent of insufficiency of the evidence—there may not be, and frequently is not, any distinction whatever. The text-books and reports speak of variance amounting to a failure of proof when referring to a case in which the evidence, though it may tend to prove *a* cause of action, wholly fails to prove *the* cause of action alleged. (22 Ency. of Pl. & Pr. 568; 1 Elliott on Evidence, sec. 204.) For instance, in 1 Chitty's Pleadings, sixteenth American edition, star page 407, it is said: "If the plaintiff, though needlessly, describe the tort, and the means adopted in effecting it, with minuteness and particularity, and the proof substantially vary from the statement, there will be a fatal variance, which will occasion a nonsuit." (*City of Bloomington* v. *Goodrich,* 88 Ill. 558.) In *Spellman* v. *Rhode,* 33 Mont. 21, 81 Pac. 395, this court held that, while the evidence tended to make out a cause of action, it was a cause entirely different from that made out in the complaint, and held that there was such a variance as amounted to a failure of proof; and held further, in effect, that the question could be presented on motion for new trial under a specification of insufficiency of

the evidence to justify the verdict. And that this may be done we have no doubt.

We do not intimate any opinion as to whether this complaint can be amended to permit a recovery against the company; but, if amended, issues will doubtless be framed which will obviate the other questions presented on this appeal, and for this reason we deem it unwise to pass upon them here.

The judgment and order are reversed, and the cause is remanded.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE SMITH: I agree to the result

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

MARCH TERM, 1909.

The HON. THEODORE BRANTLY, Chief Justice.

THE HON. HENRY C. SMITH,
THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.

STATE EX REL. KOLBOW ET AL., RELATORS, *v.* DISTRICT COURT ET AL., RESPONDENTS.

(No. 2,679.)

(Submitted March 1, 1909. Decided March 6, 1909.)

[100 Pac. 207.]

Default—Setting Aside—Refusal—Error—Supervisory Control—Statute of Limitations—Pleading—Waiver—Estates of Deceased Persons—Heirship.

Statute of Limitations—Pleading—Waiver.

1. Under section 6475, Revised Codes, the question whether an action is barred by the statute of limitations can be raised only by answer. The defense may be waived by failure to interpose it.

Default—Setting Aside—Duty of Court.

2. It is the duty of the district court to set aside a default upon a proper showing, viz.: that the moving party has presented facts which excuse his delinquency, that his interests will be injuriously affected if the default be not set aside, and that he has a meritorious defense.

Same—Affidavit of Merits—Who may Make.

3. An affidavit of merits, on motion to set aside a default judgment, may be made by the attorney of an absent party, and the verification may be upon information and belief.

Same—Setting Aside—Refusal—Error—Supervisory Control.

4. Where, after the default of all persons claiming as heirs of a deceased person, who did not appear on a certain date to establish their heirship, had been entered, foreign claimants filed a verified petition to set it aside, alleging that they did not become aware of decedent's death until after the default had been entered, that their interests would be lost to them if it was permitted to stand, and making a *prima facie* showing that they were heirs at law of the decedent, and where it appeared that they had exercised the utmost diligence in getting their claims before the district court, it was error to refuse to set aside the default. Order annulled on application for a writ of supervisory control.

SUPERVISORY CONTROL, on the relation of Johann Kolbow and others, against the district court of the second judicial district and Michael Donlan, a judge thereof, to set aside an order refusing to vacate a default judgment, and to vacate the judgment. Order directed to be set aside, and judgment vacated.

Mr. Frank A. Lenz, and *Mr. C. M. Parr,* for Relator.

Mr. Albert J. Galen, Attorney General, and *Mr. C. F. Kelley,* for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

About February 14, 1901, a person who called himself, and was generally known by the name of, Charles Colbert, died intestate in Silver Bow county, Montana, possessed of certain real property situated therein. His estate has been in the course of administration nearly all of the time since his death. At first there did not appear to be any heirs to his estate, and the state of Montana claimed the property by escheat. However, persons claiming to be heirs appeared in due time, and on July 21, 1906, one Joseph Cross, claiming to be an heir, filed his petition to have the question of his heirship determined under the provisions of sections 7670 *et seq.,* Revised Codes. Such proceedings were had therein that an order to show cause was

issued, service thereof made, proof of service established by an order of the district court, and on September 28, 1906, the default of all persons not appearing was entered. In 1908 certain persons residing in Germany, and hereafter for brevity designated the German heirs, appeared by their attorney in fact and moved the district court to set aside the default as to them, and permit them to appear in the proceedings to establish heirship. The motion is in the form of a petition, verified by the attorney in fact, and is supported by the affidavits of John Woolbeater and Frank A. Lenz. The district court denied the motion, and thereupon these German heirs applied to this court for relief. In this court their counsel contend that the right of these persons to inherit in this particular instance is conferred by section 25, Article III, of our state Constitution, and they apparently proceed upon the theory that the district court denied their motion to set aside the default because of the fact that their claims are barred by the last clause of section 4835, Revised Codes, which reads as follows: " * * * But no nonresident foreigner can take by succession, unless he appears and claims such succession within five years after the death of the deceased to whom he claims succession"; and it is earnestly contended that this portion of the section is unconstitutional. The portion of the section quoted is a statute of limitations, and in this state the bar of the statute of limitations can only be raised by answer. (Revised Codes, sec. 6475; *Grogan* v. *Valley Trading Co.*, 30 Mont. 229, 76 Pac. 211.) This being so, and the defense not having been made in that manner—and, indeed, upon a motion there is not any opportunity to raise it—the question whether the rights of these German heirs are barred was not before the district court, and could not have been before it. We must assume, then, that, in passing upon the motion, the fact that the moving parties are nonresident aliens was not considered by the district court, and that the motion must have been treated as if presented by citizens of the United States. The defense of the bar of the statute of limitations is merely a privilege which may be interposed or

waived by failing to interpose it. The district court could not anticipate that such defense would be interposed, and neither can we; so it is not necessary to pass upon the questions propounded by counsel for petitioners in their brief.

Assuming, then, as we must, that the district court did not take into consideration the fact that the moving parties are nonresident aliens, we are to treat the matter before us as if they were not such, and this leads to the only inquiry before us, which is: Should the district court upon the showing made have set aside the default? If a proper showing was made, it was the duty of the district court to set it aside. (*Greene* v. *Montana Brewing Co.*, 32 Mont. 102, 79 Pac. 693.) To constitute a proper showing, the moving parties must have presented to the trial court facts which excuse their delinquency, which show that their interests will be injuriously affected if the default is not set aside, and which show the merits of their claims. (*Schaeffer* v. *Gold Cord Min. Co.*, 36 Mont. 410, 93 Pac. 344; *Bowen* v. *Webb*, 34 Mont. 61, 85 Pac. 739.)

Counsel for the state contend that the affidavits of Woolbeater and Lenz recite only matters of hearsay. Conceding this for the purposes of this proceeding, still it is generally recognized that an affidavit of merits may be made by the attorney of an absent party (6 Ency. of Pl. & Pr. 187), and the affidavit may be upon information and belief. This last statement of the rule must be so, for a plaintiff can verify his own complaint upon information and belief (Revised Codes, sec. 6565), and a verified answer is generally held to be a sufficient affidavit of merits if it shows a defense upon the merits, and under our Code such answer may be verified by an attorney for the absent party and the verification may be upon information and belief.

If, then, we eliminate from our consideration the affidavits of Woolbeater and Lenz, we still have before us the verified petition to set aside the default made by the attorney in fact for these claimants. The particular form in which the motion and affidavit of merits is presented is not of any consequence. The law looks to the substance rather than the form, and we

hold that the verified petition is sufficient as a motion and affidavit of merits. Section 6589, Revised Codes, provides that the court may relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. This verified petition shows that these German heirs did not become aware of Colbert's death until after the default was entered, and it certainly shows that the utmost diligence was exercised in getting their claims before the district court. It shows that the interests of these claimants will be lost to them if this default is permitted to stand. It also makes out a *prima facie* showing that these claimants are heirs at law of Chas. Colbert, deceased, and these facts are all that are necessary to be made to appear. These facts appearing, the court ought to have set aside the default, and ought to have permitted these claimants to come into the proceedings to determine heirship, and file their complaint pursuant to section 7671, Revised Codes. Whether in the end this privilege will avail them anything we cannot say.

The district court is directed to set aside the order heretofore made and vacate the default as to these claimants.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

IN RE KAPPLER'S ESTATE; SCHWAB, APPELLANT, *v.* KAPPLER ET AL., RESPONDENTS.

(No. 2,616.)

(Submitted February 20, 1909. Decided March 6, 1909.)

[100 Pac. 228.]

Undertakings on Appeal—Insufficiency—Ambiguity—Dismissal.

Undertakings on Appeal—Nugatory—Meaningless Terms.

1. An undertaking in support of appeals from three orders made in a probate proceeding, which recited that the appellant would pay all damages and costs, etc., not exceeding the sum of $300, "otherwise

the obligation to become null and void; otherwise to remain in full force and effect," was rendered nugatory because made meaningless by the insertion of the term "otherwise" in the two clauses quoted.

Same—Insufficiency—Several Appeals.

2. The above undertaking was also objectionable because insufficient, the statute requiring an undertaking in the sum of $300 to effectuate each appeal, except where appeals are taken from a final judgment and a new trial order at the same time, in which case one undertaking in the penal sum of $300 is sufficient.

Same—Insufficiency—Reference to Penalty.

3. While only one undertaking need be filed in support of any number of appeals taken at the same time (Revised Codes, sec. 7107), the penalty in all cases, except on appeals from a final judgment and a new trial order, must be sufficient in amount to support all of them, and the different appeals must be referred to in such a way that the penalty may be properly apportioned, otherwise the undertaking will be insufficient for ambiguity.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

PROCEEDINGS for settlement of the estate of Lorenz Kappler. Maria Magdalena Kappler and others petitioned for the appointment of Joseph Milch as administrator with the will annexed, and Samuel Schwab, public administrator, petitioned for the issuance of letters to himself. From orders denying the application of Schwab, issuing letters to Milch, and formally appointing him upon the filing of his bond, Schwab appeals. Dismissed.

Messrs. Geier & Working, for Appellant.

Mr. C. A. Spaulding, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On June 5, 1901, Lorenz Kappler died in Lewis and Clark county, leaving a last will and testament, under the terms of which his entire estate was devised to his wife, Rosalie Kappler, for life, with remainder in equal shares to the children of his brothers and a sister mentioned by name. Rosalie Kappler was named as executrix. The will was duly presented for, and admitted to, probate by the district court of Lewis and Clark county, and on July 14, 1902, the property disposed of thereby

was distributed to Rosalie Kappler. On April 22, 1908, Rosalie Kappler died. Deeming it necessary to a proper distribution of the remainder of the estate that an administrator with the will annexed should be appointed, Maria Magdalena Kappler and others, the children of the brothers and sister named in the will, residents of the Grand Duchy of Baden, Germany, on June 25, 1908, presented their petition to the district court of Lewis and Clark county, asking that one Joseph Milch, a resident of the county, be appointed such administrator. On July 6, and before disposition had been made of this application, Samuel Schwab, the public administrator, presented his petition, asking that letters of administration with the will annexed be issued to him, claiming the right to preference over the legatees named in the will by virtue of the fact that they were nonresidents of the state of Montana. To the granting of this application the Kappler legatees made opposition by written objection, alleging and claiming that the person designated by them was entitled to the appointment over the public administrator. Such proceedings were thereafter had that both applications were heard on July 25. Thereafter, on August 1, the court entered an order denying the application of Schwab, and also an order granting letters to Milch. These were entered separately in the minutes of the court. On August 3, Milch having filed the bond required by the order of August 1, the formal order of appointment was made. Thereupon Schwab appealed from each of the orders of August 1, and also the order of August 3. When the transcript was filed in this court, the legatees moved for a dismissal of the appeals on the ground that the appellant had failed to file with the clerk of the district court an undertaking such as is required by the statute to effectuate his appeals. Before the motion was submitted, the appellant filed a new undertaking, after approval by the chief justice. Decision upon the motion was then deferred until final hearing. The specific objection to the original undertaking is that it is void, in that by its terms the surety is not bound to indemnify the respondents in any amount. At the hearing this objection was urged, with

the additional objection, which applies also to the new undertaking, that there are three appeals and that the penalty of $300, fixed in each of the undertakings, is not sufficient.

The original undertaking recites that the appellant "will pay all damages and costs which may be awarded against him on said appeals or any one of them or either of them, or on a dismissal of any one or either of them, not exceeding the sum of $300, otherwise this obligation to become null and void; otherwise to remain in full force and effect." The last two clauses render this instrument nugatory as an indemnity for costs in any amount, because in whatever sense the term "otherwise" is used the instrument is meaningless. But, passing this defect by, the penalty is insufficient, and the instrument is abortive on that ground. The statute requires an undertaking in the sum of $300 to effectuate each appeal, and unless this requirement is met, or the undertaking is waived, or a deposit is made to take its place, the appeal is ineffective. (Revised Codes, secs. 7100, 7101.) These provisions have frequently been considered by this court, and to support the conclusions stated it is only necessary to refer to some of the cases in which they have been construed and applied. (*Creek* v. *Bozeman W. W. Co.*, 22 Mont. 327, 56 Pac. 362; *Murphy* v. *Northern Pac. Ry. Co.*, 22 Mont. 577, 57 Pac. 278; *Grage* v. *Paulson*, 23 Mont. 337, 59 Pac. 1; *Washoe Copper Co.* v. *Hickey*, 23 Mont. 319, 58 Pac. 866.)

It may well be said that the order of August 1, granting letters to Milch, and the formal order of appointment made on August 3, are one and the same order, and hence that there are in fact but two appeals. This concession does not help the matter, however, for the references in the undertaking are to the appeals generally, and, under the rule stated in the cases cited, it is void for ambiguity on this ground. Nor are the appeals preserved by the new undertaking filed, since its purpose and effect was to obviate the defect in the original undertaking occasioned by the two clauses in the paragraph quoted above. The amount of the penalty named in it is the same,

and the references to the appeals are couched in the same terms. As pointed out in the cases cited, the only exception to the rule stated is in case of appeals from a final judgment and an order granting or denying a new trial taken at the same time. In such cases one undertaking in the penalty of $300 is sufficient. (Revised Codes, sec. 7107.) In addition to the cases cited above, see, also, *Hill* v. *Cassidy*, 24 Mont. 108, 60 Pac. 811; *Nolan* v. *Montana Central R. Co.*, 24 Mont. 327, 61 Pac. 880; *Baker* v. *Butte City Water Co.*, 24 Mont. 113, 60 Pac. 817; *Pirrie* v. *Moule*, 33 Mont. 1, 81 Pac. 390.

Whatever may be the number of appeals taken at the same time, only one undertaking need be filed (Revised Codes, sec. 7107), but the penalty in all cases, with the exception mentioned above, must be sufficient in amount to support all of them, and the references must be so made to each of them that the penalty may be properly apportioned.

The appeals are dismissed.

Dismissed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

STATE, RESPONDENT, v. BERBERICK, APPELLANT.

(No. 2,590.)

(Submitted February 16, 1909. Decided March 6, 1909.)

[100 Pac. 209.]

Criminal Law—Homicide—Confessions—Admissibility—Insanity—Evidence—Instructions.

Homicide—Confession—Admissibility—Evidence.

1. Evidence adduced in a prosecution for murder, examined and *held* not to show that a confession made by accused was made "under the influence of the flattery of hope and the coercion of fear," but was voluntary, and therefore admissible.

Same—Confession—Admissibility—Question for Court.

2. The question of the admissibility of a confession alleged to have been made by defendant while in custody, is one to be determined by

the court after hearing evidence, in the presence of the jury, relative to the circumstances under which it was made, and its finding thereon will not be disturbed on appeal, unless clearly against the weight of the evidence.

Same—Confession—Incompetent Witness—Evidence—Exclusion—Error.

3. Before the confession of one on trial for homicide was admitted in evidence his counsel offered proof that at the time of making it the defendant was of unsound mind. The offer was rejected. *Held*, that the court erred inasmuch as the accused was thereby deprived of the right to show that at the time of making the confession he was not a competent witness (Revised Codes, sec. 7891); and the fact that the jury, in passing upon the worth of the confession and the question whether he was capable of committing crime on the date of the murder, had the benefit of the testimony of expert and lay witnesses to the effect that defendant was insane, did not render the error nonprejudicial, since the trial judge, in determining the competency of the confession, was not advised of the mental condition of the defendant at the time he made it.

Same—Confession—Substance of—Witnesses.

4. Witnesses who did not recollect the exact words used by defendant in making a confession were properly permitted to give the substance of what was said.

Same—Written Confession—Effect of Signing.

5. Where a confession was taken down in writing, but not in the exact words used by defendant, he, by signing it and adopting the language employed, made it his own.

Same—Opinion Evidence—Mental Condition.

6. Where the mental condition of defendant, accused of homicide, was a matter to be considered by the jury in determining what weight should be given to a confession alleged to have been made by him, and where witnesses had testified that he was insane or affected with insanity, it was error to sustain an objection to a question asked a lay witness, whether in his opinion, judging from his acquaintance with defendant, the latter was weak-minded.

Same—Insanity—Lay Witness—Sufficient Acquaintance—Discretion.

7. The court did not err in refusing to permit counsel for defendant to cross-examine an under-sheriff, in whose custody the accused had been for a period of about six months prior to his trial, as to his acquaintance with defendant, before stating that in his opinion the latter was sane. The question whether the witness had sufficient acquaintance with accused to qualify him to testify as to the sanity of the latter, was addressed to the court's discretion, subject to review in case of clear abuse only.

Same—Weight of Confession—Correct Instruction.

8. An instruction to the jury in a criminal cause that they should treat an alleged written confession precisely as they would any other evidence in the case, that they were not bound to believe the statements contained therein, but should give them such weight as they thought proper, in view of all the other facts and circumstances under which it was made, including defendant's mental condition, his age, intelligence, character, disposition and experience, the fact that he was under arrest at the time, and the statements, threats or promises, if any, made to him, was correct.

Same—Reasonable Doubt—Acquittal—Erroneous Instruction.

9. In a prosecution for homicide, a charge that if, after a fair consideration of the entire testimony, the jury should entertain any rea-

sonable doubt as to whether decedent came to his death in any other manner than that charged in the information, acquittal should follow, was erroneous; the true rule being that, if the jury have any reasonable doubt that decedent came to his death in the manner charged in the information, acquittal must follow.

Appeal from District Court, Deer Lodge County; Geo. B. Winston, Judge.

JOHN BERBERICK was convicted of murder, and appeals from the judgment and an order denying a new trial. Reversed and remanded for a new trial.

Mr. W. B. Rodgers, and *Mr. John H. Tolan,* for Appellant.

There can be no question but what, under the circumstances surrounding this confession, it was made both under the influence of the flattery of hope and the coercion of fear, and that therefore it was clearly inadmissible. (*Bram* v. *United States,* 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568; *Brown* v. *Walker,* 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819; *Territory* v. *McClin,* 1 Mont. 394; *Territory* v. *Underwood,* 8 Mont. 131, 19 Pac. 398; *People* v. *Castro,* 125 Cal. 521, 58 Pac. 133; *Banks* v. *State,* 84 Ala. 430, 4 South. 382; *State* v. *Clifford,* 86 Iowa, 550, 41 Am. St. Rep. 518, 53 N. W. 299; *State* v. *O'Brien,* 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399; *Stephen* v. *State,* 11 Ga. 225; *Johnson* v. *State,* 76 Ga. 76; *Smith* v. *State,* 10 Ind. 106; *Commonwealth* v. *Nott,* 135 Mass. 269; *State* v. *Whitfield,* 70 N. C. 356; *State* v. *Crowson,* 98 N. C. 595, 4 S. E. 143; *Hoober* v. *State,* 81 Ala. 51, 1 South. 574; *State* v. *Nagle,* 25 R. I. 105, 105 Am. St. Rep. 864, 54 Atl. 1065; *Peck* v. *State,* 44 South. 760; *Rex* v. *Partridge,* 7 Car. & P. 557.) The language of the county attorney substantially to the effect that it would be better for the defendant to confess, that is to say, that he would derive some advantage therefrom or escape some danger, renders the confession induced or brought about thereby inadmissible in evidence. (*People* v. *Thompson,* 84 Cal. 598, 24 Pac. 386; *People* v. *Barric, supra; Collins* v. *Commonwealth,* 15 Ky. Law Rep. 691, 25 S. W. 744;

Searcy v. *State*, 28 Tex. App. 513, 19 Am. St. Rep. 851, 13 S. W. 782; *People* v. *Stewart*, 75 Mich. 21, 42 N. W. 662; *Hoober* v. *State, supra.*) The county attorney, under the laws of our state, is authorized to call witnesses before him and examine into the commission of any public offense. This makes his position similar in many respects to that of an examining magistrate or coroner, and confessions obtained from the defendant by means of such examinations by a person in authority are universally viewed with great suspicion, and are almost invariably rejected by the courts. (*Wilson* v. *State*, 84 Ala. 426, 4 South. 383; *People* v. *Mondon*, 103 N. Y. 211, 57 Am. Rep. 709, 8 N. E. 496; *State* v. *O'Brien, supra; Peck* v. *State, supra.*)

The admission of the confession in evidence against the defendant in the case at bar was a violation of the defendant's constitutional rights under section 18 of Article III of the Constitution of the state of Montana. (*Bram* v. *United States, supra.*) It was also in violation of the fifth amendment to the Constitution of the United States. This amendment was made applicable to the several states by the fourteenth amendment to the Constitution of the United States. (*United States* v. *Hall*, Fed. Cas. No. 15,282; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; *State* v. *Moor*, Walker (Miss.), 134, 12 Am. Dec. 541.)

Evidence as to the insanity of the defendant, his physical and mental incapacity, was competent and material in determining the question as to whether or not the confession should have been admitted. (12 Cyc. 464; *State* v. *Mason*, 4 Idaho, 543, 43 Pac. 63; *Hoober* v. *State, supra; Peck* v. *State, supra; Flagg* v. *People*, 40 Mich. 706.)

Mr. Albert J. Galen, Attorney General, and *Mr. W. H. Poorman*, Assistant Attorney General, for Respondent.

The object of all evidence is to elicit the truth, and there is neither logic nor reason in rejecting a confession on the ground and for the reason that the confessor had the opportunity to lie, for all witnesses have that opportunity. There is no presump-

tion in law that any witness is a perjurer; if there was he would not be permitted to testify, for truth, not perjury, is the sole purpose of a trial. A defendant is no exception to this rule for he may be a witness and may testify. "The more practical rule would be to receive confessions without question, unless they are shown to have been improperly induced, especially since a contrary rule may involve the difficulty of proving a negative." (1 Wigmore on Evidence, sec. 860.) The admissibility of a confession is solely a question of law for the court. (*State* v. *Sherman*, 35 Mont. 512, 119 Am. St. Rep. 869, 90 Pac. 981.) A confession is not excluded because of any illegality in the method of obtaining it. (1 Wigmore on Evidence, sec. 823.) The test is, "Was there an inducement of a nature calculated under the circumstances to induce a confession irrespective of its truth or falsity?" (*Id.*, sec. 831.) The material facts appearing in the confession were corroborated by other evidence, and the rule stated in 1 Wigmore on Evidence, section 856, that in such event the confession may be accepted without hesitation, is applicable.

Mere weak-mindedness is no defense. Insanity means more than this. (12 Cyc. 164 *et seq.*; 22 Cyc. 1113.) "A low order of intelligence does not tend to prove insanity." (*Powell* v. *State*, 37 Tex. 348.) The evidence in this case was general insanity. There being no evidence of special dementia or any special form of insanity, the court did not err in refusing to give instructions covering them. (*Carr* v. *State*, 96 Ga. 284, 22 S. E. 570; *People* v. *Hubert*, 119 Cal. 216, 63 Am. St. Rep. 72, 51 Pac. 329; *People* v. *Griffith*, 146 Cal. 339, 80 Pac. 68; *People* v. *Willard*, 150 Cal. 544, 89 Pac. 124.) Nor did the court err in refusing to give a proposed instruction relating to insanity of the defendant at the time of trial. (*People* v. *McCarthy*, 115 Cal. 255, 46 Pac. 1073; *People* v. *Lee Fook*, 85 Cal. 300, 24 Pac. 654; *People* v. *Coffman*, 24 Cal. 231.) Neither was it proper for the court to instruct the jury that they should make a finding as to the sanity or insanity of the defendant at the time of making the confession, and then disregard the confession,

if they found the defendant insane at that time. (*People* v. *Fallon*, 149 Cal. 287, 86 Pac. 689.)

MR. JUSTICE SMITH delivered the opinion of the court.

The state of Montana accused the above-named defendant and one Frank Carpenter of the crime of murder. Separate trials were demanded, and this defendant was convicted of murder in the second degree. He appeals from the judgment of conviction and also from an order denying him a new trial.

At the time of the commission of the alleged offense Berberick was about eighteen and Carpenter fifteen years of age. On January 14, 1907, the dead body of John Johnson was found near the manure pile at the ranch of George Parrott, about seven miles east of the city of Anaconda. Tracks were found in the snow about the place, and several witnesses testified to having seen Berberick and Carpenter going in the direction of the ranch in the morning and returning in the afternoon. Johnson was an employee of Parrott's and was alone at the ranch on the day in question, Parrott having gone to Anaconda the day before. The weather was extremely cold. Between 2 and 3 o'clock on the afternoon of the 14th the discovery was made that the door of the ranchhouse had been broken open, and an iron safe had been wrecked, apparently with some high explosive. Pieces of giant powder were found. Parrott had no giant powder. Hanging upon a nail in the wall, and covered by a man's cap, was a revolver belonging to Parrott; when he left home on the 13th this revolver contained five cartridges; when he returned on the afternoon of the 14th it contained but one. The autopsy of the body of Johnson disclosed four bullet wounds, and the examining surgeon testified that he died from hemorrhage due to the wounds.

William A. Taylor, the under-sheriff of Deer Lodge county, testified for the state that on the 16th of January the defendant, who was then in custody in the county jail, received a copy of the "Butte Inter-Mountain" newspaper from Isabel Flem-

ing, the sheriff's daughter, who gave it to him at Taylor's request.

Thomas Stewart, the deputy county attorney of Deer Lodge county, testified: That on the evening of the 16th, in the sheriff's office at the jail, in the presence of Taylor, the under-sheriff, Mr. Allen, the coroner, Mr. Cole, a reporter for the "Anaconda Standard" newspaper, and Messrs. Edward Beal and A. N. Strom, Mr. James, the county attorney, asked the defendant if he had sent for him, and received the reply that he had. That Mr. James then told the defendant that, "if his purpose was to make a confession or statement, he would state his rights to him before he should make any statement whatever"; that he (the defendant) "must understand that there was absolutely no hope of reward or promise of any kind held out to him, or promise of leniency or consideration in any way for the fact of his making this confession * * *; that before the statement was made Mr. James introduced himself to Berberick and introduced each of the others present, and told Berberick what official capacity each one occupied in this county, if they were officers; that he then proceeded to tell him that there were absolutely no threats made against him; that he was absolutely free to make this statement or not make it, just as he chose; that the fact that he was under arrest need not be considered by him; that if he made a statement it must be absolutely free, without any feeling that he was compelled or forced in any way, or that there was any inducement or hope of any kind held out to him; that he further told him that he was entitled to the aid of counsel, and if he desired an attorney or any friends of his to be present when he would make a statement, if that was his intention, that we would send for any attorney he desired, or for any friends of his that he might desire to have present. * * * He stated that he did not desire any attorney, and had no friends that he cared to send for; that he had sent for Mr. James himself, and that it was his desire to make a statement; that he understood that there was no offer made to him, was no inducement of any kind held out, and he said that he was not

acting under fear of anyone or being compelled by anyone; that his statement was made freely and voluntarily by him. * * * It was stated to him that Mr. James was the county attorney, and it would be his duty to prosecute any action that might be prosecuted against him, and if he made a statement that that statement not only could but would be used against him in prosecution of any action that might be prosecuted against him on the charge that was against him at that time. * * * Mr. Cole took down his statement on the typewriter. * * * I read the statement back to him, and he made some suggestions as to some changes, and the changes were made. His rights were then again stated to him; * * * that is, that he was not acting under any duress or under any threats of any kind; that this statement, if he signed it, must be signed by him freely and voluntarily; that he must not expect or could not expect any reward or any leniency or any consideration from the fact that he had made a confession; that this statement could and would be used against him; that there were absolutely no offers made to him; that he would receive no consideration from the fact that he had made a confession; that it would not aid him or help him in any way so far as the county attorney's office was concerned or so far as any consideration was concerned as being given to him for making a confession; that he was to act freely of his own will and without the sanction or the force or influence of any person. * * * He signed the confession at that time in the presence of the persons I have named. * * * After the statement had been made to him as to his rights, he stated that he had read the confession of Carpenter as published in the 'Inter-Mountain' of that same evening."

Stewart's testimony was, more or less, corroborated by Strom, Beal, Cole, Allen, James, and Taylor. Strom also testified: "James might have said at the time that it would be better for Johnny to confess, or words to that effect; I would not say. There might have been a similar statement to that made. Mr. James might have said to him, 'So, Johnny, you have concluded it is best for you to confess,' or words to that effect; I would

not say for sure; I could not say anything about that. There might have been some similar statement. * * * Well, I kind of think there was something like that said. That is my best recollection, that there was something like that said." Beal and Allen testified that they did not remember and did not believe that Mr. James made such statements. Mr. Cole testified: "The defendant did not dictate the statement in just the way it appears there, that was not his exact language, but the statements there are substantially correct. The language used by James and the defendant was to some extent interwoven. * * * The statement, however, is substantially as he made it; perhaps not in the exact words, but is practically the same thing. It may be that there are lots of words, or some words, that were used there that night in making the statement that are not down in that statement, and I believe it to be true, according to my own recollection at this time, that there are some words in there that the boy never used. When the boy came in there he appeared very cold and calm and quiet. I do not think he smiled or changed his face in any way or showed any emotion. There was a slight flicker of a smile on his face at one time during the interview, and that was just merely passing, that was the only thing that would show that he—well, to show any emotion." Mr. Allen, the coroner, testified that on the morning of the 15th he was present with the jailer when the county attorney questioned Berberick at the jail; and Taylor testified that when James came out of the jail he brought out a statement that he had taken down, and stated "that he had not been able yet to get the boys to confess, or words to that effect." Taylor also testified that the confession of Carpenter was obtained on the morning of the 16th, and that he told Berberick that Carpenter had confessed. He said: "I told him that, I expect, for the purpose of having an effect on his mind, so that he might, if he would, * * * make some kind of a confession or statement. * * * I sent in the copy of the 'Inter-Mountain' of the 16th so that Johnny could read what the other defendant testified or swore to, the confession the other

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boy had made. I did it to see if he would admit it himself, admit that he was connected with it. Then I asked him what he thought about his pal's cough-up. I wanted to see what effect the 'Inter-Mountain' had had on him, to see whether he was ready to admit any connection with the crime. I asked him if he wanted to make a statement, and he said then to send for the county attorney." Mr. James testified that he had an interview with Berberick at the jail on the morning of the 16th in presence of the coroner and the jailer; that he advised the defendant of his rights and privileges at that time, told him that any statement he made must be voluntary, without fear or inducement, and would be used against him; that Berberick made a statement at that time which Mr. James reduced to writing; that he was then advised that he "did not have to sign it unless he wanted to"; that he hesitated a moment and then declined to sign it. The county attorney testified, also, that during this morning conversation he told Berberick that he had a statement from Carpenter, called his attention to a discrepancy between the two statements, and may have used language indicating that if he would state where he was on the 14th that would enable the county attorney to decide whether or not he was the man wanted.

The defendant's counsel then offered in evidence, for the sole purpose of determining the admissibility of the confessions and in support of their objections thereto, a copy of the "Inter-Mountain" of January 16th, containing the confession of Carpenter. In this confession Carpenter stated circumstantially and in detail the movements of himself and Berberick on January 14, how Berberick shot Johnson four times with the revolver found on the nail under the cap in the house, how they blew up the safe, and were immediately afterward frightened away. Counsel then offered to prove by defendant's sister and other witnesses the life and experiences of the defendant from an early age; that his father died at the age of thirty-three years of mental and spinal disease; that relatives on the father's side were insane; that his stepfather was very harsh and cruel

with him; that he had injured his head when a small boy; that as he grew older he became moody, despondent, and inattentive to what was going on around him; that he had fainting spells, talked of committing suicide, and finally ran away from home; that it was agreed in the family that he was crazy; and that at the time the confession was made "the boy was of unsound mind, affected with insanity, crazy." The court rejected the offer.

Formal objections to the admission in evidence of the confessions were then filed, the grounds of which will be hereafter noticed. The court sustained the objections as to the copy of Carpenter's confession and the alleged confession of Berberick made on the morning of January 16, and overruled the objections to the confession made on the evening of that day. This last confession was then read to the jury. It is a detailed narrative of the movements of Carpenter and defendant on January 14, admits the killing of Johnson by the defendant, and is substantially the same as Carpenter's confession. Both Carpenter and the defendant stated that they obtained whisky at a roadhouse on the way to Parrott's ranch. The employees of the roadhouse denied this. It appears later in the state's rebuttal testimony that the authorities had been making some inquiries relative to the sale of whisky to the boys on the day in question. Berberick's confession is prefaced and concludes with statements that it is made freely and voluntarily, without any promise or hope of reward, and with the knowledge that it may be used against him. Both confessions, except as to the matter of obtaining whisky, fully corroborate the state's witnesses, who testified to having seen the boys on the 14th between Anaconda and the Parrott ranch. After the state rested its case, the defendant introduced testimony of experts and laymen to the effect that in their opinion Berberick was weak-minded on January 14th and at the time of the trial, and was insane. This testimony was rebutted by the state. Comprehended therein were all the matters included in the defendant's

offer of proof made before the confession was received in evidence. The defendant did not testify.

1. The first point made by appellant's counsel is that the confession of Berberick "ought never to have been admitted, because there can be no question but what under the circumstances surrounding his confession it was made under the influence of the flattery of hope and the coercion of fear." They cite *Bram* v. *United States*, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, *Territory* v. *McClin*, 1 Mont. 394, *Territory* v. *Underwood*, 8 Mont. 131, 19 Pac. 398, and several other cases in support of their contention. Let it be noted at the outset that the testimony of Strom as to what James told Berberick on the evening of the 16th (which testimony, by the way, was not very positive) was contradicted by Allen and Beal. It thereafter became the duty of the trial court to decide whether any such statement was in fact made, and, the confession having been admitted in evidence, the presumption must be that the court found that no such statement was made. This conclusion is also borne out by the testimony of the county attorney himself. Eliminating this testimony, we have left in the record for consideration only the evidence of the county attorney as to what he said to Berberick in the cell on the morning of the 16th. As to this testimony counsel for the defendant say in their brief: "In this first conversation the county attorney in effect assured the defendant that it would be better for him to make a statement, or that it would be to his advantage. No other reasonable interpretation of the language used by the county attorney can be made." Particular stress is laid upon this evidence of the county attorney, and we quote it because it is important: "I do not recall that I said anything to Berberick about his being the man they wanted, and as to whether I said anything to him about his not being the man I wanted. I cannot recall making any such statement as that. I might have told him that this statement, showing where he was on the 14th, would show whether or not he was the man wanted, or language to that effect. I may have made such a statement as that, but

if I did I cannot recall it. I would not say that I more than likely did make such a statement as that. I might have made such a statement, but I cannot recall it; and, if I did, I certainly would endeavor to.

"Q. That is, you may have said in substance to him that by his explanations of where he was, or anything else, he might not be the person you wanted for this crime? A. No, I would not say that I said that in substance in any such manner. I would say that I did not say anything in that manner, that I did not say that in substance.

"Q. Did you say to him, if a person could show you that he was not there, then he was not the man you wanted, something like that? A. I may have used language that would indicate it, but I do not think that I used those terms. I may have said to him that any statement he made would show where he was on that day.

"Q. And that he might not be then the person that you wanted, as you said before? A. My language might indicate that; but I do not recall, however, having made any such statement.

"Q. But you may have made it, something like that, in the course of your conversation, as you said a while ago? A. No, I would not put it that way. I would state that I told him, in substance, that, if he told where he was on the 14th, it would indicate as to where he was on that day; but, as to whether or not that would indicate whether he had anything to do with this killing, or not, I cannot recall that. I do not think I said anything to him about its being a good idea for him to tell me about this matter. In fact, I know I did not say anything about its being a good idea. The word 'idea' never was used." We do not think this testimony will bear the construction placed upon it by counsel for the defendant. We find therein no assurance, either directly or by implication, that it would be better for Berberick to make a confession, or that it would be to his advantage to do so. It may, perhaps, be conceded that under the great weight of authority, if the language employed by the

county attorney could be so construed, any confession subsequently made would be inadmissible. Numerous cases are cited to this effect, and such appears to be the law. Although, as we become, by the passage of time, further removed from those conditions which gave rise to the rule, the opinion is more frequently expressed that there is, in this age, no logical reason why confessions should stand upon any different footing in the administration of the criminal law than any other kind of evidence against the defendant; that every alleged confession should go to the jury, together with all the attendant facts and circumstances tending in any way to throw light upon the mental condition and physical surroundings of the defendant at the time, to the end that they may determine the ultimate question of the truth or falsity of the statements so made. But, adhering to the rule, we find in this case no evidence that any inducements whatever were held out to the defendant.

We must assume that the learned district judge believed the evidence of the witnesses who were present at the jail on the evening of the 16th. That testimony showed that the defendant requested the county attorney to come to him, that he was advised of his right to have an attorney or any friend present, was told that any statement he made would be used against him, was informed that he need have no fear of any consequences arising from his refusal to make a statement and no hope of reward or lenience if he did make one, that he said he understood the situation, and what his rights were in the premises. Cases involving facts showing that threats were made against, or inducements held out to, the defendant, have no application to this case.

In the case of *Territory* v. *McClin, supra,* it appeared that the deputy sheriff, who had the defendant in custody, told him that it would be better for him to confess his guilt, and it appeared from the bill of exceptions: "In addition to the above, further evidence was introduced that a mob of one hundred men were around and about the jail where defendant was confined, at intervals of nearly all one day; that threats were fre-

quently made against the defendant that if he did not confess he would have one hundred lashes, would be hung, etc.; that word was brought to defendant that one person confined with him and recently taken out by the mob had been hung; that the names of defendant and others confined in the jail and the addresses of their parents and friends had been taken down by the deputy who arrested him, in writing, with their knowledge; that in consequence of these threats and demonstrations defendant was greatly excited and alarmed so that he shed tears; and further that no evidence was produced that the inducements held out by the deputy sheriff were at any time withdrawn, or that the mind of the defendant was at any time freed from the apprehensions occasioned by said violent threats and demonstrations."

In the case of *Territory* v. *Underwood, supra,* it appeared that the defendant was in the custody of an officer on a charge of obtaining money from the Granite Mountain Mining Company under false pretenses; the officer told him "it would be better for him to go back and tell Captain Plummer, the superintendent of the company, all about it; that he thought he would withdraw it, or ease it as light as he possibly could; that he thought Captain Plummer would help him out of it, if he would give his evidence against the other two, for the very reason that Plummer had told Kelly that he would do so, and he thought he would do so for Underwood." The court said: "These promises were certainly inducements that clearly vitiate the confession of the prisoner."

In *Bram* v. *United States, supra,* the facts were these: The captain of a vessel was found murdered. The crime had been committed on the high seas. Brown, a seaman, had, immediately after the homicide, been arrested by the crew in consequence of suspicion aroused against him and had been placed in irons. As the vessel came in sight of land, and was approaching Halifax, the suspicions of the crew having been also directed to Bram, the mate, he was arrested by them and placed in irons. On reaching port these two suspected persons were delivered

to the custody of the police authorities of Halifax and were there held in confinement awaiting the action of the United States consul, which was to determine whether the suspicions which had caused the arrest justified the sending of one or both of the prisoners into the United States for formal charge and trial. Before the examination had taken place, a police detective caused Bram to be brought from jail to his private office, and, when there alone with the detective, he was stripped of his clothing, and, either while the detective was in the act of so stripping him, or after he was denuded, the conversation offered as a confession took place. Before the alleged confession was allowed to be given to the jury, the trial court inquired of the detective as follows: "You say there was no inducement to him in the way of promise or expectation of advantage? A. Not any, your honor. Q. Held out? A. Not any, your honor. Q. Nor anything said in the way of suggestion to him that he might suffer if he did not—that it might be worse for him? A. No, sir; not any. Q. So far as you were concerned, it was entirely voluntary A. Voluntary, indeed. Q. No influence on your part exerted to persuade him one way or the other? A. None whatever, sir; none whatever." The court, over the objection of the defendant, then allowed the detective to testify, as follows: "When Mr. Bram came into my office, I said to him, 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder.' He said: 'He could not have seen me. Where was he?' I said, 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said, 'Now, look here, Bram, I am satisfied that you killed the captain, from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' He said: 'Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it.' "

Mr. Justice White, writing the opinion of the court, said, *inter alia:* "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the fifth amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.' * * * A brief consideration of the reasons which gave rise to the adoption of the fifth amendment, of the wrongs which it was intended to prevent, and of the safeguards which it was its purpose unalterably to secure, will make it clear that the generic language of the amendment was but a crystallization of the doctrine as to confessions, well settled when the amendment was adopted, and since expressed by the text-writers and expounded by the adjudications, and hence that the statements on the subject by the text-writers and adjudications but formulate the conceptions and commands of the amendment itself. * * * In this court it has been settled that the mere fact that the confession is made to a police officer, while the accused was under arrest in or out of prison, or was drawn out by his questions, does not necessarily render the confession involuntary; but, as one of the circumstances, such imprisonment or interrogation may be taken into account in determining whether or not the statements of the prisoner were voluntary." The court, in holding that Bram's statement was not voluntary, used language which clearly shows that the circumstances considered as having most weight in that case are entirely absent from the case at bar. The court said: "Bram had been brought from confinement to the office of the detective, and there, when alone with him, in a foreign land, while he was in the act of being stripped or had been stripped of his clothing, was interrogated by the officer, who was thus, while putting the questions and receiving answers thereto, exercising complete authority and control over the person he was interrogating. Although these facts may not, when isolated each from the other, be sufficient to warrant the inference that an influence compelling a statement has been exerted, yet, when

taken as a whole, in conjunction with the nature of the communication made, they give room to the strongest inference that the statements of Bram were not made by one who in law could be considered a free agent. To communicate to a person suspected of the commission of crime the fact that his cosuspect has stated that he has seen him commit the offense, to make this statement to him under circumstances which call imperatively for an admission or denial, and to accompany the communication with conduct which necessarily perturbs and engenders confusion of thought, and then to use the denial made by the person so situated as a confession, because of the form in which the denial is made, is not only to compel the reply but to produce the confusion of words supposed to be found in it, and then use statements thus brought into being for the conviction of the accused. A plainer violation as well of the letter as of the spirit and purpose of the constitutional immunity could scarcely be conceived of. Moreover, aside from the natural result arising from the situation of the accused and the communication made to him by the detective, the conversation conveyed an express intimation rendering the confession involuntary within the rule laid down by the authorities. What further was said by the detective? 'Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' But how could the weight of the whole crime be removed from the shoulders of the prisoner as a consequence of his speaking, unless benefit as to the crime and its punishment was to arise from his speaking? Conceding that, closely analyzed, the hope of benefit which the conversation suggested was that of the removal from the conscience of the prisoner of the merely moral weight resulting from concealment, and therefore would not be an inducement, we are to consider the import of the conversation, not from a mere abstract point of view, but by the light of the impression that it was calculated to

produce on the mind of the accused, situated as he was at the time the conversation took place. Thus viewed, the weight to be removed by speaking naturally imports a suggestion of some benefit as to the crime and its punishment as arising from making a statement. This is greatly fortified by a consideration of the words which preceded this language—that is, that Brown had declared he had witnessed the homicide, and that the detective had said he believed the prisoner was guilty and had an accomplice. It, in substance, therefore called upon the prisoner to disclose his accomplice, and might well have been understood as holding out an encouragement that by so doing he might at least obtain a mitigation of the punishment for the crime which otherwise would assuredly follow."

We have quoted thus at length from the *Bram Case* for the reason that it was decided by the supreme court of the United States, and because it is confidently relied on by the defendant's counsel. Accepting what is there said as to the law, we are of opinion that such law applied to the testimony actually received in this case should not result in a determination that Berberick's confession was not voluntarily made. Indeed, Mr. Justice Brewer, with the concurrence of the Chief Justice and Mr. Justice Brown, dissented from the result reached in the *Bram Case*. He said: "I dissent because I think the testimony was not open to objection." "A confession, if fairly and voluntarily made, is evidence of the most satisfactory character." (*Hopt* v. *People*, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262, reaffirmed in *Sparf* v. *United States*, 156 U. S. 51, 715, 15 Sup. Ct. 273, 39 L. Ed. 343.) "The fact that the defendant was in custody and in irons does not destroy the competency of the confession." "Confinement and imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary and was not obtained by putting the prisoner in fear, or by promises." (See, also, *Wilson* v. *United States*, 162 U. S. 613, 16 Sup. Ct. 895, 40 L. Ed. 1090.) "The detective, when called, testified positively that no threats were made nor any inducements held out to Bram, and this general declaration he

affirmed and reaffirmed in response to inquiries made by the court and the defendant's counsel." (See, also, *State* v. *Storms*, 113 Iowa, 385, 86 Am. St. Rep. 380, 85 N. W. 610.)

This court held in *State* v. *Sherman*, 35 Mont. 512, 119 Am. St. Rep. 869, 90 Pac. 981, that the question of the admissibility of an alleged confession was to be determined by the court after hearing, in the presence of the jury, evidence of the circumstances under which it was made. Particular attention was called in that case to section 3441 of the Code of Civil Procedure of 1895 (Revised Codes, sec. 8055), providing that all questions of the admissibility of testimony and the facts pertaining to such admission shall be decided by the court. (See, also, 1 Wigmore on Evidence, sec. 487.) In this case the court followed the course of procedure indicated in the *Sherman Case*, and it may be as well to say in this connection that we see no reason for applying any different rule to the decision of the trial court on the facts pertaining to the admission of testimony than is applied to any other determination of fact by that court. Facts so found will not be disturbed unless they are clearly in conflict with the weight of the evidence on the subject. Whether a confession was prompted by some inducement of hope or fear is a question of fact. We have no hesitancy in saying here, however, that, so far as the evidence actually received is concerned, we agree with the conclusion reached by the district court. (See, also, *Maull* v. *State*, 95 Ala. 1, 11 South. 218.)

2. The contention that the county attorney was acting in a capacity similar to that of an examining magistrate is not borne out by the testimony.

3. But counsel offered to prove, before the confession was admitted in evidence, that at the time of making it the defendant was of unsound mind. Let us inquire into the effect of this offer. The following is section 479 of 1 Wigmore on Evidence: "The use of the phrase 'testimonial evidence' must not be understood as applicable exclusively to assertions made on the witness-stand. Any assertion, taken as the basis of an inference as to the existence of the matter asserted, is testimony, whether

made in court or not. Thus all the statements received under the exceptions to the hearsay rule are genuinely testimony. Assertions made on the witness-stand are merely the commonest class of testimonial evidence. It follows that the qualifications of a witness are equally essential in the use of extrajudicial assertions." In the case of *State* v. *Haywards*, 62 Minn. 474, 65 N. W. 63, the supreme court said: "According to the modern doctrine, inmates of lunatic asylums, and other persons conceded to be insane when offered as witnesses, may be held competent. Such persons are presumed to be incompetent as witnesses, and, if challenged for incompetency, it is the duty of the judge to examine into the question as a preliminary matter, and if he is of the opinion that the witness is so insane that he has not sufficient capacity to understand the obligations of an oath, to perceive what occurred, and remember and narrate what he perceived, then he should hold him incompetent; but if the judge is of the opinion that the witness has this capacity, he may hold him competent and leave the question of his credibility to the jury."

In *District of Columbia* v. *Armes*, 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618, the supreme court of the United States said: "The general rule, therefore, is that a lunatic or a person affected with insanity is admissible as a witness if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue; and whether he have that understanding is a question to be determined by the court, upon examination of the party himself, and competent witnesses who can speak of the nature and extent of his insanity."

In the case of *Regina* v. *Hill*, 5 Cox C. C. 259, this principle was laid down, and Mr. Justice Talfourd said: "In every case the judge must determine according to the circumstances and extent of the delusion."

The court said in *Kendall* v. *May*, 10 Allen (Mass.), 59: "The rule * * * is that it is for the judge to satisfy himself

whether the witness understands the nature of an oath and is capable of testifying. He then decides upon the competency of the witness, and if he admits him, it is left to the jury to estimate the value of his testimony."

The supreme court of Virginia, in *Coleman* v. *Commonwealth*, 25 Gratt. 865, 23 Am. Rep. 711, said: "A witness is not excluded merely because he is a lunatic. That is not enough *per se* to exclude him; but he must at the time of his examination be so under the influence of his malady as to be deprived of that 'share of understanding' which is necessary to enable him to retain in memory the events of which he has been witness, and gives him a knowledge of right and wrong. If at the time of his examination he has this share of understanding, he is competent. That is the test of competency, and of such competency the court is the judge; whilst the weight of the testimony—the credit to be attached to it—is left to the jury." (See, also, *People ex rel. Norton* v. *New York Hospital*, 3 Abb. N. C. (N. Y.) 229, and *Spittle* v. *Welton*, L. R. 11 Eq. Cas. 420.)

Messrs. Underhill & Clark, in their article on Criminal Law, under the subhead "Confessions—Voluntary Character" (12 Cyc. 464), say: "Whether a confession is voluntary depends largely upon the facts of the particular case. If it is obtained by reason of oral threats of harm, by promise of benefit, or by actions of those in control of the prisoner which are equivalent to such threats or promises, it is involuntary and incompetent, and in determining whether it was obtained by such means the sex, age, disposition, education and previous training of the prisoner, his mental qualities, his physical health, and his surroundings are elements to be considered." The mental qualities of the defendant were noted and considered by the courts in *Peck* v. *State*, 147 Ala. 100, 41 South. 759; *Hoober* v. *State*, 81 Ala. 51, 1 South. 574; *State* v. *Mason*, 4 Idaho, 543, 43 Pac. 63; *Flagg* v. *People*, 40 Mich. 706; *Burton* v. *State*, 107 Ala. 108, 18 South. 284; *Green* v. *State*, 40 Fla. 474, 24 South. 537.

Section 7890, Revised Codes, provides that all persons, without exception, otherwise than as thereafter specified, who, hav-

ing organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Section 7891 provides: "The following persons cannot be witnesses: (1) Those who are of unsound mind at the time of their production for examination." While it appears upon the face of the testimony actually considered by the court that the defendant was not compelled to be a witness against himself, for the reason, as we have seen, that his confession was apparently voluntary, he was nevertheless deprived of the right to show, if he could, that at the time of making the confession, which was afterward given in evidence against him, he was not a competent witness, because, as his counsel offered, in the words of the statute, to show, he was of unsound mind. It is true that the jury had the benefit of the testimony on this subject in passing upon the worth of his confession, and the question whether he was capable of committing crime on January 14th; but the judge had not that light in deciding the competency of the confession made by him on the 16th—that is, to say, whether the defendant was a competent witness against himself at the time he made it. If he was not competent to testify, it was his right to have the confession excluded, and it is not to be inferred that, because the jury concluded he was sane on the 14th, the judge would have reached the same decision as to his condition on the 16th.

The attorney general calls our attention to the case of *People* v. *Miller*, 135 Cal. 69, 67 Pac. 12. In that case a witness had testified that a statement by the defendant was voluntarily made. Upon the witness being asked to give the statement, counsel for the defendant requested permission to ask some questions showing the conditions under which the statement was made. The court declined to grant this request, saying they might question him upon cross-examination. The supreme court, after deciding that the trial court should permit a cross-examination for the purpose of showing the particular circumstances under which the confession was made, before permitting the confession itself to go in evidence, held that it appeared from the record that

the defendant was not prejudiced by the ruling. The opinion then concludes: "Testimony was given upon the cross-examination and also by other witnesses tending to show that by reason of a bullet wound in his head the defendant was not in the full possession of his faculties at the time he made the statement. This, however, did not affect the admissibility in evidence of the confession itself, but was evidence to be considered by the jury in determining the weight or effect to be given to it." We do not understand from the opinion exactly how or when the question was raised, but it nowhere appears therein that before the statement was received in evidence any offer was made to prove that the defendant was not a competent witness. But it does appear that the testimony as to his physical condition was received, and, of course, it then became the duty of the jury to weigh and consider it.

We have discovered in the books another case on this subject, that of *State* v. *Feltes,* 51 Iowa, 495, 1 N. W. 755. The court said: "Evidence that the defendant at the time of the alleged confession was intoxicated or insane was proper to impair or destroy the effect of the confession. The defendant was allowed to introduce such evidence upon cross-examination, but he complains that he should have been allowed to introduce it first. In our opinion the court did not err. It was for the jury to determine what weight should be given to his confession, in view of his mental condition as shown. The court, therefore, could not properly have excluded evidence of the confession. Nor do we think it was the defendant's right to show his condition first, by way of preparing the mind of the jury against any undue impression from the evidence of the confession. The time when the jury was made acquainted with it must, we think, be deemed immaterial." Counsel for the defendant had asked leave to show by the witness who gave evidence of the confession, and other witnesses, that the defendant was "under the influence of intoxicating liquor and was affected by *delirium tremens,* or otherwise insane * * * to the end that the court might sustain their objection to (the witness) testifying in regard to the confession, if the court should be satisfied that the defend-

ant was affected with *delirium tremens,* or otherwise insane, or, at least, if the testimony was to be received it should be after the jury had been made acquainted with the defendant's condition." It will be observed that the supreme court did not specifically decide that the trial court need not have considered the testimony before passing upon the competency of the confession, but did hold that, so long as the jury had the benefit of the evidence, it was immaterial when it was introduced. Perhaps, as the offer was in the alternative, the ruling may be considered as technically correct. Professor Wigmore, however, in volume 1 of his work on Evidence (section 494, note 1), says that the ruling seems erroneous. At any rate, in view of the authorities and the provisions of our statute, we do not see our way clear to follow it.

In the case of *State* v. *Hill,* 65 N. J. L. 626, 47 Atl. 814, the court said: "When a confession is offered by the state in a criminal case, it is the right of the counsel of the prisoner, before it is admitted, to cross-examine the witness who proposes to testify to it as to the circumstances surrounding the making of it, and the defense may also call, at the same time, independent witnesses and examine them, going thoroughly into the whole matter as to how the confession came to be made, the parties present, the physical condition and state of mind of the prisoner at the time it was made, and then the court, with all these facts before it, is to pass upon its admission. * * * The law always presumes a man to be conscious and sane, and, if the contrary exists, thereby defeating the natural presumption, it must be shown by the party who alleges it. The condition, mental and physical, of a prisoner at the time of the alleged confession, if shown to the judge, may very materially affect his decision upon the question of its admission, and the prisoner has the right to have it all disclosed before the court passes upon it."

We think the defendant should have been allowed to introduce testimony as to his mental condition on the evening of the 16th, before the confession was admitted in evidence.

In the case of *Grayson* v. *State,* 40 Tex. Cr. 573, 51 S. W. 246, it is said: "Article 768, Code Cr. Proc. 1895, provides that

children are not competent to testify in courts, who do not possess sufficient intellect to relate transactions with respect to which they are interrogated, or who do not understand the obligation of an oath. We think that, by analogy, the above statute might be applied as a test of the admissibility of confessions; that is, if the party against whom the confessions are introduced is shown not to possess sufficient intelligence to make a statement as to the transaction interrogated about, or has not sufficient intelligence to understand the nature and obligation of an oath, that the statement or confession of such witness ought not to be received in evidence."

4. Exception is taken to the ruling of the court in allowing witnesses who did not recollect the exact words used at the jail on the evening of the 16th to give the substance of what was said. We think the court did not err in this regard. The substance of a conversation is, generally, all that any witness can remember, and we cannot doubt that this is all the law requires in regard to confessions. (1 Greenleaf on Evidence, sec. 218, and 3 Wigmore on Evidence, sec. 2097.) And by signing the confession and adopting the language the defendant made it his own. (*Commonwealth* v. *Coy*, 157 Mass. 200, 32 N. E. 4; *Commonwealth* v. *Hildreth*, 11 Gray (Mass.), 327.)

5. A witness, Edward Richards, was sworn for the defendant. After narrating certain peculiarities in the conduct and demeanor of the defendant during the time of their acquaintance, he was asked this question: "Mr. Richards, I will ask you, from your acquaintance with him, from what you know of the boy, and all you know of him, whether in your opinion he had an ordinarily good mind, or whether he was weak-minded at the time you knew him?" The court sustained an objection to the question. We think this was error. Whether the defendant was weak-minded was a matter to be considered by the jury in determining what weight should be given to his confession, and the testimony might also have served to supplement that of the defendant's witnesses who testified that he was insane or affected with insanity. (See *People* v. *Worthington*, 105 Cal. 166, 38 Pac. 689.)

6. Taylor, the under-sheriff, after testifying to his acquaintance with, and observation of, the defendant as a prisoner in the jail during a period of about six months prior to the trial, was allowed to testify, over the objection of defendant, that in his opinion he was sane. We think the court cannot be put in error for admitting this testimony. This court, in *State* v. *Penna,* 35 Mont. 535, 90 Pac. 787, said: "Since there are all degrees of intimacy, * * * it is sometimes * * * difficult to determine what an intimate acquaintance is. The determination of the relation must be left in every case to the trial court; its discretion in the matter not being subject to review except in cases of clear abuse of it." If the trial court was of opinion that sufficient acquaintance had been shown to warrant overruling an objection to the question, no error was committed in refusing permission to cross-examine before the answer was given.

7. Exception is taken to the action of the court in refusing to give to the jury certain instructions requested by the defendant. After reading the instructions given, we are of opinion that, with the exception of those hereinafter mentioned, they fully and fairly stated the law and substantially covered the matters incorporated in all those refused, with the exception of proposed instruction 15.

8. Proposed instruction 15 reads as follows: "The jury are instructed that an insane person cannot be a witness upon any trial, and that therefore, if you believe from the evidence that the defendant at the time of the making of the confession, which has been introduced in evidence, if he did make such confession, was an insane person, or if you have any reasonable doubt as to whether or not the defendant was insane at such time, then you should not give such confession any weight whatsoever in this case." As has heretofore been said, the question of the defendant's competency as a witness at the time of his confession was for the court to decide. Had the court admitted the confession after hearing testimony as to defendant's mental condition, it would then have been the province of the jury to

weigh the confession as they would any other evidence. On this point the court gave the following instruction, which we think is correct: "(42) If the jury believe from the evidence beyond a reasonable doubt that the defendant, John Berberick, made the confession as alleged, and which has been admitted in evidence in this case, the jury should treat such alleged confession precisely as they would any other testimony in the case. You are not bound to believe as true the statements contained in such alleged confession, but may give to them such weight as you think proper in view of all the other facts and circumstances appearing on the trial, and in determining the weight to be given to such alleged confession you may take into consideration all the circumstances under which the same was made, including the age, mental condition, intelligence, lack of intelligence, character, situation, disposition and experience of the defendant, the fact that he was under arrest at the time the same is alleged to have been made, the statements, threats, or promises, if any, made to him at the time, and all the other attending circumstances. The jury are at liberty to judge of it like any other evidence, in view of all the circumstances of the case as disclosed by the evidence, for your power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion and in subordination to the rules of evidence."

9. Exception is taken to instruction No. 17, given by the court, as follows: "If, after a fair and impartial consideration of the entire testimony in this case, you entertain any reasonable doubt as to whether the deceased came to his death in any other manner than that charged in the information, then it is your duty to acquit the defendant." While, in the light of other instructions given, this one was probably not prejudicial to the defendant, it is nevertheless erroneous; the true rule being that, if the jury have any reasonable doubt that the deceased came to his death in the manner charged in the information, they should acquit the defendant.

The foregoing disposes, in effect, of all questions involved in the case on appeal.

The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE, RESPONDENT, v. NIELSON, APPELLANT.

38 451
39 267

(No. 2,615.)

(Submitted February 19, 1909. Decided March 6, 1909.)

[100 Pac. 229.]

Criminal Law — Homicide—Information—Sufficiency—Instructions—Limiting Evidence to Certain Purposes—Commenting on Weight of Evidence.

Homicide—Information—Deliberation and Premeditation—Surplusage.

1. The elements of premeditation and deliberation are matters of proof, from which the jury may draw their own inference in fixing the degree of the murder charged against defendant, and need not be alleged in the information; hence, an objection to such a pleading that, in alleging that accused willfully, etc., and of his "deliberately premeditated" malice aforethought killed another, the terms "deliberately" and "premeditated" characterized the malice and not the killing, and were, therefore, abortive as elements of the definition of murder in the first degree, was without substance. The words quoted were surplusage.

Same—Information—Sufficiency—Murder in Second Degree—Manslaughter.

2. Where defendant was convicted of manslaughter under an information which charged all the elements of murder in the second degree, he will not be heard to complain that the pleading was insufficient to charge murder in the first degree.

Same—Information—Means of Killing.

3. In charging murder it is not necessary that the means by which the killing was done should be alleged.

Same—Defenses—Instructions—Limiting Evidence to Certain Purposes.

4. Where the defendant, in a prosecution for homicide, relied solely upon the defense that the killing was excusable, because accidental, and done while accused was attempting to disarm deceased, who, while hunting, was trespassing on lands in defendant's charge, an instruction which, in restricting evidence of trespasses to the purposes of aiding the jury in determining why defendant was armed at the time and whether the killing was accidental, practically withdrew from the jury's consideration evidence showing justification or palliation, was not prejudicial to defendant. The court did not err in not recognizing a defense upon which accused himself did not rely.

Same—Instructions—Commenting on Weight of Evidence.

5. Nor was the instruction, referred to in the foregoing paragraph, objectionable as commenting upon the weight of the evidence, where, in restricting the evidence to the purposes indicated, it became necessary to refer to it, but, in doing so, the court did not express any opinion as to the weight which the jury should give to it.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

SOFUS NIELSON was convicted of manslaughter, and from the judgment, and an order denying a new trial, he appeals. Affirmed.

Messrs. Breen & Hogevoll, for Appellant.

The information is defective in that it fails to set forth the means whereby the offense was committed. (*State* v. *Keerl,* 29 Mont. 510, 101 Am. St. Rep. 579, 75 Pac. 362; *State* v. *Sundheimer,* 93 Mo. 311, 6 S. W. 52; *Territory* v. *Poulier,* 8 Mont. 147, 19 Pac. 594; 4 Current Law, p. 7; *State* v. *Fontenot,* 112 La. 628, 36 South. 630; *Miller* v. *United States,* 133 Fed. 337, 66 C. C. A. 399; *United States* v. *Post,* 113 Fed. 852; *United States* v. *Hess,* 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; *People* v. *Aro,* 6 Cal. 208, 65 Am. Dec. 503; *People* v. *Wallace,* 9 Cal. 31; *People* v. *Lloyd,* 9 Cal. 55; *People* v. *Dolan,* 9 Cal. 576.) Not every offense defined by statute is sufficiently described in the information by following the language of the statute (*People* v. *Schmitz* (Cal.), 94 Pac. 419); therefore the old idea of simply following the language of the statute is no longer law in all cases. (*State* v. *Shenton,* 22 Minn. 311.) In reference to the requirements of a common-law indictment, we desire to call the court's attention to Hammond's 4th Blackstone, 393, 394, with relation to this subject. (See, also, 1 McLean on Criminal Law, p. 370, and Wharton's Criminal Pleading and Practice, secs. 166, 258.)

If the person to be arrested is armed with a deadly weapon, the officer is justified, even to the extent of killing, to make the arrest. (21 Cyc. 798, citing, *Lindle* v. *Commonwealth,* 23 Ky. Law Rep. 1307, 64 S. W. 986.)

Instruction No. 23 commented on the evidence and invaded the province of the jury. (*State* v. *Schnepel*, 23 Mont. 523, 59 Pac. 927; *State* v. *Mahoney*, 24 Mont. 281, 61 Pac. 647; *State* v. *Jones*, 32 Mont. 442, 80 Pac. 1095; *Macon Railway etc. Co.* v. *Vining*, 123 Ga. 770, 51 S. E. 719; *Smith* v. *Hazlehurst*, 122 Ga. 786, 50 S. E. 918.)

Mr. Albert J. Galen, Attorney General, and *Mr. Wm. L. Murphy*, Assistant Attorney General, for Respondent.

An indictment good at common law is sufficient as an information under the statute. (*State* v. *Lu Sing*, 34 Mont. 31, 85 Pac. 521; *State* v. *McGowan*, 36 Mont. 422, 93 Pac. 552; 1 Archibald's Criminal Practice and Pleading, 881.) A pleading in the language of the statute, in terms as broad as the statute, is sufficient. (21 Cyc. 834.) It is not necessary to allege the particular means or manner by which death was accomplished, for an "unlawful, felonious, premeditated * * * killing, with malice, etc.," is a murder, by whatever means it was accomplished. (Revised Codes, sec. 9156.) This information is sustained by the following authorities: *State* v. *McGowan*, 36 Mont. 422, 93 Pac. 552; *State* v. *Hliboka*, 31 Mont. 455, 78 Pac. 965; *People* v. *Hyndman*, 99 Cal. 3, 33 Pac. 782; *People* v. *Suesser*, 142 Cal. 354, 75 Pac. 1093; *People* v. *Ung Ting Bow*, 142 Cal. 341, 75 Pac. 899; *People* v. *Lee Look*, 137 Cal. 590, 70 Pac. 660.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The information in this case charged the defendant and one William Warnecke with murder. Defendant, having been granted a separate trial, was convicted of manslaughter, and has appealed from the judgment and the order denying him a new trial.

The body of the information is as follows: "William Warnecke and Sofus Nielson are accused by James E. Murray, the duly elected, qualified and acting county attorney in and for

the county of Silver Bow, state of Montana, by this information, in the name and on behalf and by authority of the state of Montana, of the crime of murder, committed by them, the said defendants, William Warnecke and Sofus Nielson, as follows, to-wit: That at the county of Silver Bow, state of Montana, on or about the twenty-ninth day of September, A. D. 1907, and before the filing of this information, the said defendants, William Warnecke and Sofus Nielson, did willfully and unlawfully and feloniously, and of their deliberately premeditated malice aforethought, kill and murder one Chris. Stanisich, then and there being a human being. Contrary to the form," etc. While many assignments of error are made by counsel, only two are discussed in the brief. We shall therefore notice these only.

It is said that the terms "deliberately" and "premeditated" characterize the malice, and not the killing, and are therefore abortive as elements of the definition of murder in the first degree as laid down in the statute. The objection is without substance. "Murder is the unlawful killing of a human being with malice aforethought." (Revised Codes, sec. 8290.) It is charged that the killing was with malice aforethought, and however else the condition of mind indicated by this expression is regarded as modified by the addition of the words referred to, the scope and meaning of the expression is not in any way restricted. It was pointed out by Mr. Chief Justice Wade, in the early case of *Territory* v. *Stears*, 2 Mont. 324, that an indictment was sufficient at common law which charged that the killing was done feloniously, willfully, and with malice aforethought, and that the elements of premeditation and deliberation were matters of proof, from which the jury should draw their own inference in fixing the degree. This form of indictment or information has been considered by this court since in several cases, and has always been held sufficient. (*Territory* v. *McAndrews*, 3 Mont. 158; *State* v. *Metcalf*, 17 Mont. 417, 43 Pac. 182; *State* v. *Hliboka*, 31 Mont. 455, 78 Pac. 965; *State* v. *Lu Sing*, 34 Mont. 31, 85 Pac. 521; *State* v. *Hayes, ante*, p. 219, 99 Pac. 434.) It is difficult, if not impossible, to distinguish between the expressions "deliberate and premeditated killing

with malice aforethought" and "killing with deliberate and premeditated malice aforethought." (*State* v. *Metcalf, supra.*) For, so far as the elements of premeditation and deliberation enter into the state of mind accompanying the act of killing, the one expression imports them as much as does the other. As we have seen, these elements are matters of inference from the evidence, and it is not necessary to charge them. But were it necessary to charge them in order to sustain a conviction of murder in the first degree, the information here charges all the elements of murder in the second degree, and, since the defendant was convicted of manslaughter, a crime included therein, he cannot complain that he was not charged with murder in the first degree. If the information had simply charged manslaughter, it would have been sufficient to sustain the conviction. (*Williams* v. *State*, 35 Ohio St. 175.)

The further objection is made that the information is insufficient in that it does not charge the means by which the killing was done. This point was decided adversely to the appellant in the case of *State* v. *Hayes, supra,* and is too well settled in this jurisdiction to require discussion. (*State* v. *McGowan,* 36 Mont. 422, 93 Pac. 552; see, also, *People* v. *Hyndman,* 99 Cal. 1, 33 Pac. 782; *People* v. *Lee Look,* 137 Cal. 590, 70 Pac. 660; *People* v. *Ung Ting Bow,* 142 Cal. 341, 75 Pac. 899; *People* v. *Suesser,* 142 Cal. 354, 75 Pac. 1093.)

It is plausibly contended that the court erred in submitting the following instruction: "23. You must not be misled by evidence of aggravated trespasses about the ice pond, nor mistake the purpose of such evidence. None, nor all of said trespasses, nor injury or damage caused thereby, nor aggravation or annoyance due to them, nor anger or resentment justly aroused by them, justifies or excuses the killing of Chris. Stanisich by defendant. And, too, note that Chris. Stanisich was guilty of none of such trespasses, save the trifling one of shooting ducks the day he was killed. There are certain trespasses against occupied dwelling-houses, and certain felonies that may be resisted and prevented at the time, to the extent of taking life, but not as punishment, after the trespasses are completed. But where, as

in the case of Chris. Stanisich, the trespass is on land and of a being inconsiderable, it cannot be resisted or prevented by taking life, nor by assault with, or use of, a dangerous weapon; for life and limb are sacred and especially within the protection of the law, and not to be taken or seriously injured or menaced, save for great and compelling offenses, The law affords ample redress for trespasses on a man's land, or against his property, of the character here testified to, but does not sanction taking life to prevent or punish them. So in this case the evidence of trespasses was admitted, not that it established a defense for killing deceased, but that you may consider it to aid you, so far as it can, in determining the object and intent of defendant in being armed at the place where deceased was killed, and in determining whether the killing was unlawful or accidental. And if the killing was because of such trespasses and feeling aroused thereby, or because deceased was trespassing when killed, and not accidental, as defendant claims, it is murder, and you should so find by your verdict."

In order to understand the purport of this assignment, it will be necessary to make a brief statement of the facts leading up to the homicide. The Butte Ice Company owns an icehouse, with ice ponds, situate about three miles south of the city of Butte, in Silver Bow county. William Warnecke and the defendant were employed by the company to harvest and store ice during the winter, and get it out for distribution during the summer. Warnecke had charge as foreman or superintendent, and his wife kept the boarding-house for the men employed. For some time prior to the morning on which the homicide occurred, there had been a good deal of reckless and careless shooting about the ponds and buildings by persons going out from the city to hunt ducks and other small game sometimes found about the ponds and in the adjoining fields. In some instances shot and bullets entered the boarding-house and the other buildings. In one or two instances some of these trespassers had shot at members of Warnecke's family. A horse of his had been killed by a bullet which had entered the stable. These reckless acts had caused so much anxiety to Warnecke's

family and the employees about the ice ponds that he finally sought and procured from the sheriff an appointment as deputy. in order that he might arrest and disarm the offending parties. In the meantime the term of office of the sheriff making the appointment had expired. The appointment had not been renewed. Though on the morning of the homicide Warnecke supposed he was acting as deputy sheriff, such was in fact not the case. Notices had been posted about the premises forbidding hunting and shooting. On this morning the deceased, with three other men, went out to the ponds to shoot ducks. There is some uncertainty as to whether all had guns, and whether the deceased had gone there with more than one companion. In any event, three were armed, and the four were apparently together. There is a conflict in the evidence as to whether Warnecke warned these men off the premises, prior to the homicide, or not. It is certain that he went out from his house two or three times during the morning to warn off persons who were engaged in shooting, and that when he went out with the defendant and two others upon a repetition of the shooting, he found the deceased and the others there. He, with his companions, undertook to arrest them. The defendant had a Winchester rifle. Warnecke had a revolver. The state's witnesses testified that the other two in company with them were armed with guns, though this was denied by the defendant and his companions. The state's witnesses testified that the defendant had already disarmed one of the parties; that he then approached the deceased, and demanded that he surrender his gun and submit to arrest; that the deceased, not being able to understand English, or not being willing to give up his gun, refused, and that thereupon, while he stood holding his gun with both hands, the defendant shot him in the face, killing him instantly. The defendant testified that when demand was made upon the deceased for his gun, and he (defendant) approached him to take it, the deceased raised his gun and thrust it in defendant's face; that defendant, being encumbered with the two guns, raised his own to strike aside that of the deceased. and that in doing this it was accidentally discharged, killing

deceased. In this statement he was corroborated by his companions in so far as they could speak from appearances. No other shot was fired. It seems to have been the custom of Warnecke, in case he found trespassers upon the premises, to arrest and disarm them, and then release them, leaving the guns at the city office of the company whence they could be reclaimed afterward by the owners. The defendant at the trial undertook to show that the homicide was accidental, and therefore excusable. It was not claimed or suggested by him or his witnesses that he shot in self-defense, or that the shooting was done in the heat of passion provoked by any wrongful act of the deceased or any of his companions. There was no evidence tending to show that deceased or his companions were ever upon the premises before. The evidence tended rather to show the contrary.

Counsel make the point that the instruction prejudiced the defendant by withdrawing from the jury consideration of any personal trespass upon him by the deceased, which the evidence tended to establish. Inasmuch as the defendant relied exclusively upon the defense that the homicide was excusable, because accidental, the restriction made by the court of the purpose for which the evidence was admitted could not have prejudiced the defendant as alleged. It is true, consideration of the evidence for the purpose of justification or palliation is eliminated entirely. Yet defendant cannot claim prejudice because the court did not recognize a defense upon which he himself did not rely, and instruct the jury with reference to it.

The same may be said of the contention that the instruction is erroneous in that it comments upon the weight of the evidence. Whether it lays down the law correctly as to the extent to which one may go in resisting a trespass upon his property it is not necessary to consider or decide. But it was entirely proper for the court to define the purpose for which the evidence had been offered and admitted, and to limit it directly to this purpose. In doing this it became necessary to refer to it; but there is nowhere expressed, even by implication, an opinion as to the weight which the jury should give to it.

We find no prejudicial error in the record. The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

SCHAEFFER, RESPONDENT, v. MUTUAL BENEFIT LIFE INSURANCE CO., APPELLANT.

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(No. 2,613.)

(Submitted February 20, 1909. Decided March 6, 1909.)

[100 Pac. 225.]

Principal and Agent—Sale of Real Estate—Special Agent—Unauthorized Act—Liability of Principal.

Principal and Agent—Authority of Agent—Sale of Land.
1. The authority of an agent to sell land must be in writing.

Same—Dealing with Special Agent.
2. A person dealing with a special agent is bound at his peril to ascertain the scope of the agent's authority.

Same—Sale of Real Estate—Special Agent—Unauthorized Act—Receipt of Partial Payment—Liability of Principal.
3. Plaintiff entered into negotiations with defendant company, through its agent, for the purchase of real estate. The latter had no general authority to sell the premises, but had to submit every proposition to his principal before acting upon it. This the plaintiff knew. Before a contract had been actually entered into, plaintiff paid to the agent $5,000 as part of the purchase price. After such payment the deal was declared off by defendant company, the parties having been unable to agree upon the terms of sale. All but $1,000 was returned by the agent to plaintiff, who brought suit against the company to recover that sum. *Held*, that, the agent having been a special one, plaintiff was bound at his peril to ascertain the former's authority, that the agent exceeded his authority in accepting the partial payment, that his receipt of the sum mentioned was not the receipt by his principal, and that plaintiff could not recover from the latter.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by Lincoln H. Schaeffer against the Mutual Benefit Life Insurance Company. From a judgment for plaintiff, and

from an order denying a new trial, defendant appeals. Reversed.

Messrs. Gunn & Rasch, for Appellant.

Mr. Edward Horsky, and *Messrs. Walsh & Nolan*, for Respondent.

Where an agent is employed for the sale of property, a contract between him and an intended buyer for the payment of a commission by the latter to the former, in case of a sale, is illegal on account of its tendency to cause the agent to violate his duty to the seller. (15 Am. & Eng. Ency. of Law, 2d ed., 947.) When an agent acts for both parties in making a contract requiring the exercise of discretion, the contract is voidable in equity upon the application of either party, or the circumstance is available as a defense in an action at law upon the contract, and the agent is not entitled to commission for his services. (1 Am. & Eng. Ency. of Law, 1073, 1074; *Rice* v. *Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Ranney* v. *Donovan*, 78 Mich. 318, 44 N. W. 276.) An authority to make a contract for the sale of lands will authorize the agent to receive so much of the proceeds of the money as is to be paid in hand on the sale, as an incident of the sale. (*Alexander* v. *Jones*, 64 Iowa, 207, 19 N. W. 913.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to recover the sum of $1,000 and interest. The complaint alleges that about June 1, 1905, plaintiff and defendant entered into a contract by which plaintiff agreed to purchase from defendant, and defendant agreed to sell to plaintiff, the Denver Block in Helena; that, pursuant to said agreement, plaintiff paid to the defendant $5,000 on the purchase price, and collected certain rents from the property; that thereafter, about June 20, 1905, by mutual consent, the contract was rescinded, and each party thereto agreed to return to the

other whatever of value he had received under the contract; that plaintiff returned to defendant the rents collected by him, but defendant did not return the $5,000 or any part thereof, except the sum of $4,000, and refuses to return the remaining $1,000. The answer admits the corporate existence of defendant company, and denies each and every other allegation of the complaint. The plaintiff recovered judgment, and defendant appeals from the judgment and an order denying it a new trial.

The insurance company owned the Denver Block in Helena, and T. B. Miller was its agent for the purpose of renting the building and collecting the rents. The plaintiff, being desirous of purchasing the property, interviewed Miller, who on May 6, 1905, wrote to the company inquiring the price for, and the terms upon which, the property would be sold. The answer of the company indicated that it would want about $40,000 for the property. This was not satisfactory to Schaeffer, and at Miller's suggestion Schaeffer made an offer for the property, and on May 17 Miller assumed to transmit this offer to the company in a letter in which he says: "He [Schaeffer] will purchase the Denver Block, paying therefor $30,000 on the following terms: $5,000 cash, $2,500 in two years, $2,500 in four years, and $20,000 in ten years, interest on deferred payments to be at the rate of four per cent. Deed to be given when $10,000 has been paid on the property and contract for deed given prior to that time. He will pay the taxes for this year and in the future. He would want you to allow the insurance in force at the time of purchase to remain without any expense to him." In reply to this, the vice-president of the company on May 24 wrote: "Our directors are willing to accept an offer of $30,000 for the property, but not on the terms proposed." On May 31 Miller telegraphed the company what purports to be a second offer by Schaeffer for the property, as follows: "Party offers thirty thousand Denver Block, five thousand cash, one thousand each year for five years, balance in ten years, deferred payments five per cent. Shall I accept? Answer." On June 1 the company answered: "You may sell Denver Block for thirty thousand; five thousand cash, balance secured by bond

and mortgage payable one thousand each year for five years, and twenty thousand in ten years with interest at five per cent." Upon receipt of this telegram by Miller, Schaeffer paid over to Miller $5,000, and on the same day Miller telegraphed the company as follows: "Have sold Denver Block as per terms your telegram this date. Interest payable annually. Have collected first payment five thousand." The company then wrote Miller, suggesting that it preferred to have the interest made payable semi-annually. On June 5 Miller again telegraphed the company: "Is proposition five per cent *annual* interest deferred payments Denver Block acceptable, if not purchaser requests return of first payment? Answer." And to this the company replied on June 6: "Deferred payments Denver Block may be five per cent payable annually." On June 6 Miller wrote to the company at length, referring to the letters and telegrams which had passed, and, among other things, said: "The understanding with Mr. Schaeffer for the purchase of the Denver Block is as follows: He is to make payments as above indicated, is to have the rents from June 1 and pay all bills from June 1, you to continue the insurance in force without cost to him, that is now on the building, until date of expiration." In reply to this, the company on June 12 said: "You refer to the insurance now on the buildings. We declined to accept the proposition that the purchaser shall have the insurance to the date of expiration of the existing policies without cost to him. It will be necessary for him to pay for the unexpired term of the policies, in accordance with the universal custom. We give below the amount of premiums to be collected." The amount was $320. On June 18 Miller again telegraphed the company: "Schaeffer will not pay unearned premium on insurance and will only have insurance enough made payable to you to protect amount due you at all times on mortgage. Shall I close sale on those conditions or call trade off? Wire answer." And to this the company replied on June 19: "Call trade of Denver Block off. Return money to Schaeffer." On June 19 Miller telegraphed the company: "Denver Block deal off. Have

returned Schaeffer his money." The foregoing correspondence was introduced in evidence by the plaintiff.

The plaintiff testified in his own behalf, and, speaking of his first interview with Miller, says that when he made inquiry of Miller, and Miller told him the company would want about $40,000 for the block, he replied: "That is too much"; that Miller then said: "Probably we can get a better price. * * * Step in in a few days. I will write to the company and see what I can do." Speaking of his first offer for the property, the plaintiff says that, "when Miller had received a reply to his letter of inquiry, Miller then said: 'You make me an offer. They will take $30,000. They want $10,000 down.' I said: 'I cannot think of paying $10,000 down. I will pay $5,000 cash and $1,000 a year for five years.' The interest agreed upon was five per cent. That was all very well and good, and he submitted it to the company, and they accepted the terms. The insurance that was on the building was to remain as it was without any additional expense to me. I was also to have possession of the block on June 1. * * * The deal was consummated. I should judge, along about the 1st of June, 1905." The plaintiff does not refer in his testimony at all to the second offer which Miller made the company, as shown above; but with respect to this first offer he further testified: "When I had this agreement with Miller for the purchase of the Denver Block, part of the agreement was that I was to pay the taxes for that year. All the insurance that was then on the property I was to have. I was to have the premiums which had been paid by the company. I was to pay $5,000 cash, $1,000 each year for five years, and $20,000 in ten years. The security on these deferred payments was to be a mortgage on the building—on the property, to be executed by myself and wife. That was the understanding."

Miller was called as a witness for the plaintiff and testified that he wrote the letter of inquiry of May 6 and submitted the offer of May 17 at the request of Schaeffer. He says: "I was doing this thing for Schaeffer, charging him a commission for it." Taking the evidence offered for the plaintiff as a whole,

it is not susceptible of two constructions. The offer of May 17, which Miller submitted to the company, is not the offer which Schaeffer says he made; but whether it is or not is immaterial, for the company specifically rejected it in its letter of May 24. Whether Schaeffer ever authorized the offer of May 31 we are left entirely to conjecture, so far as plaintiff's testimony is concerned. Since the offer of May 17 was rejected by the company, there never was any contract entered into, unless it was upon the basis of the offer of May 31, which does not include any reference to unearned premiums of insurance or the right of Schaeffer to the rents after June 1. It is said in respondent's brief that, when the telegrams of June 1 and 6 were sent by the company to Miller, the proposition that Schaeffer should have the unearned insurance premiums had been by implication accepted by the company. The proposition that Schaeffer should have these unearned premiums is mentioned in only two communications. The first is in the offer of May 17, which the company refused, and in refusing the offer it refused to concede this proposition to Schaeffer. The matter is again mentioned in Miller's letter of June 5, in which he undertakes to state the terms of sale as understood by Schaeffer; and immediately upon receipt of this letter the company repudiated the alleged contract so far as it includes that proposition, and again refused this concession. So that it cannot be urged that the company ever by implication or otherwise agreed to this claim which Schaeffer appears to have considered of great consequence. According to Schaeffer's own testimony, he never agreed to the terms of the offer of May 31, and, accepting this as correct, then there never was a contract, for the minds of the parties never met. According to Schaeffer's testimony, the only offer he ever authorized included both unearned premiums and rents from June 1, and, as the company never agreed to either of these conditions, there could not have been a contract. In its letter of June 12 the company says: "If the sale is promptly closed, the rents from June 1 will be payable to the purchaser," but the sale was never promptly closed nor closed at all; and, since there was not any contract, there could not, as a matter of

course, be any rescission of a contract, and in these two respects, at least, the evidence fails to support the allegations of the complaint.

That Miller was a special agent for the company in the matter of this attempted sale appears beyond controversy, and that Schaeffer knew this is likewise apparent. He knew that Miller did not have authority generally to sell this property or to fix a price or the terms of sale, for he knew that Miller had to submit every proposition to the company. Furthermore, since they were dealing with real estate, Schaeffer knew, or, what amounts to the same thing, he was presumed to know, that Miller's authority had to be in writing. There is not any question of ratification involved here. "An agent for a particular act or transaction is called a special agent." (Revised Codes, sec. 5415.) A person dealing with a special agent is bound to ascertain the scope of the agent's authority, and, if he does not, he deals at his peril. (*Moore* v. *Skyles*, 33 Mont. 135, 114 Am. St. Rep. 801, 82 Pac. 799, 3 L. R. A., n. s., 136.) Miller testifies that he showed Schaeffer all of the correspondence passing between himself and the company. Schaeffer says he did not see any of it. He testifies: "[I] didn't ask Miller to let me see any of the correspondence of the company. I took his word for everything." To accept Schaeffer's version does not aid him in the least; for he knew that Miller was acting under delegated authority, and it has become a trite saying that "where one deals with another, acting under delegated authority, it is his own folly if he does not inform himself of the scope of the authority." (*Dozier* v. *Freeman*, 47 Miss. 647.) "There being a written authority, persons dealing with the party holding it are bound to inform themselves of its extent, and inquire into its limitations." (*Rawson* v. *Curtiss*, 19 Ill. 455.) Since Schaeffer was charged with knowledge that Miller's authority had to be in writing, he was bound to ascertain the terms and conditions of the letters and telegrams which conferred the authority, or deal at his peril if he failed to so inform himself. (*Miller* v. *Wehrman* (Neb.), 115 N. W. 1078.)

The rule with regard to special agents is well settled. "Their acts do not bind their principals unless they pursue their authority strictly, and those who deal with them are chargeable with notice of the extent of their authority." (*Milne* v. *Kleb*, 44 N. J. Eq. 378, 14 Atl. 646.) If Schaeffer had examined the letters and telegrams from the company to Miller, he would have known just the extent of Miller's authority; and, if he did not do so, he has made himself the victim of his own folly. Miller could sell upon the terms given in the telegrams of June 1 and 6, and upon no other terms.

This action, of course, proceeded upon the theory that the payment of $5,000 to Miller was payment to the company. Section 5441, Revised Codes, provides: "A special agent to sell has authority to receive the price on delivery of the thing sold, but not afterward." Miller never had authority to deliver possession of the property to the plaintiff. The right of plaintiff to the possession would follow as a matter of course upon the completion of the sale; but the papers necessary to evidence the transaction were to be prepared and the interests of the company conserved, not by Miller, but by Mr. Gunn, the company's attorney. Whether Miller undertook to give possession of the property to Schaeffer is not made plain from the testimony offered on behalf of the plaintiff. He did, however, receive the $5,000 as part payment, and, assuming that he delivered possession of the property to Schaeffer, it is perfectly manifest that in each instance he exceeded his authority.

It is contended by respondent that Miller had authority to receive the $5,000 for the company, and that he did so receive it. In his brief it is said: "An authority to make a contract for the sale of lands will authorize the agent to receive so much of the proceeds of the money as is to be paid in hand on the sale as an incident of the sale." This is correct, but such authority does not authorize the agent to receive a part of the purchase price before any contract of sale is entered into, and neither does it authorize the agent to receive a portion of the purchase price upon a contract which the agent is not authorized to make. From *Brown* v. *Grady*, 16 Wyo. 151,

92 Pac. 622, it appears that one Scott owned certain lands. He authorized Jones, his special agent, to sell upon certain stated terms. Jones undertook to sell to Brown upon different terms, and evidenced the agreement by a memorandum in writing and received $400 as a part of the purchase price. Scott afterward sold to Grady, who brought suit against Brown for possession and for damages. The supreme court says: "Brown was dealing with a special agent with limited authority, and he was bound to know the extent of the agent's authority. This principle is too well settled to require the citation of authorities; but see 1 Ency. of Law, 2d ed., p. 987. We think the agent clearly exceeded his authority in executing the instrument above set out; and this attempted sale, not having been ratified by Scott, was invalid, and he was not bound thereby. Counsel for defendant in error place some reliance upon the payment of the $400 by Brown to Jones. * * * But this money never was paid to or received by Scott, and Jones could not bind him by the receipt of money on a contract which he (Jones) had no authority to make." And to the same effect is *Jackson* v. *Badger*, 35 Minn. 52, 26 N. W. 908, where the supreme court of Minnesota said: "Although the $50 earnest-money, paid by the plaintiffs to the agents, has never been repaid, that does not charge the defendant with liability if he never authorized nor ratified the contract upon which it was paid, nor by receiving the money or otherwise placed himself in the position of having sanctioned the payment. The contract being without his authority, the receipt of the deposit money by the agent was unauthorized, and was not in legal effect a receipt by the defendant."

Since there was not any contract entered into, Miller did not have any authority to receive the $5,000, and its receipt by him was not the receipt of that amount of money by the company, and, this being so, it follows that the plaintiff cannot recover any portion of it from the company. There is not any question of ostensible authority involved here. The company did not do anything which would lead Schaeffer to believe that Miller had any authority other than that actually conferred by the letters and telegrams. Neither is there any question of rati-

fication involved, since it is apparent that, if Miller and Schaeffer ever agreed upon any terms, they were different from those authorized by the company, and, as soon as apprised of the terms as Schaeffer understood them, the company repudiated them in its letter of June 12.

We have disposed of this case upon the evidence offered on behalf of the plaintiff alone. The evidence offered by the company presents the question in quite a different aspect; but, since it does not aid the plaintiff at all, we deem it unnecessary to consider it or the other errors specified in appellant's brief.

The judgment and order are reversed, and the cause is remanded for a new trial or for other proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

STATE, RESPONDENT, v. HUGHES, APPELLANT.

(No. 2,622.)

(Submitted March 10, 1909. Decided March 20, 1909.)

[100 Pac. 610.]

Criminal Law—Violation of Eight-hour Law—Employer and Employee — Contractors — Subcontractors — Evidence —Insufficiency.

1. H., a general contractor, sublet to others a contract for the construction of a city sewer. Thereafter he had no further control of the work except to the extent of seeing that the requirements of his contract with the city were complied with. The men employed were paid by the subcontractors, who had exclusive control over, and direction of, them. H. was charged with a violation of the eight-hour law (Revised Codes, secs. 1739, 1740), and convicted. *Held*, that defendant did not sustain the relation of employer to any of the men employed by the subcontractors, and could therefore not be held responsible for the conduct of the latter in requiring their men to work more than eight hours a day.

Appeal from District Court, Yellowstone County; Sydney Fox, Judge.

NICK HUGHES was convicted of a violation of the eight-hour law, and, from the judgment and an order denying his motion for new trial, he appeals. Reversed and remanded.

Messrs. Hogan & Lamb, for Appellant.

The provisions of this Act are so indefinite that it is difficult to determine therefrom exactly to whom its provisions are intended to apply, and there is no other eight-hour law, with the exception of that of the state of Utah, provided for in the Constitution of that state. (*State* v. *Holden*, 14 Utah, 71, 46 Pac. 756, 37 L. R. A. 103; *In re Morgan*, 26 Colo. 415, 77 Am. St. Rep. 269, 58 Pac. 1071, 47 L. R. A. 52), which is identical to the Montana eight-hour law. Similar laws of nearly all other states having such a law expressly provide to whom their provisions are intended to apply by enumerating the different classes—contractor, subcontractor, agent, foreman or employer—and providing that any of them violating the provisions of the law shall be deemed guilty. (*In re Dalton*, 61 Kan. 257, 59 Pac. 336, 47 L. R. A. 380; *State* v. *Davis*, 43 Wash. 116, 86 Pac. 201; *In re Boyce*, 27 Nev. 299, 75 Pac. 1, 65 L. R. A. 47; *City of Cleveland* v. *Clements Const. Co.*, 67 Ohio St. 197, 93 Am. St. Rep. 670, 65 N. E. 885, 59 L. R. A. 775; *United States* v. *Ollinger*, 55 Fed. 959.) It was probably intended that our law should operate in the same manner. Although the provisions of our Act do not name subcontractors, it must have been intended to include them. (*People* v. *Orange County Road Const. Co.*, 175 N. Y. 84, 67 N. E. 129, 65 L. R. A. 33.) These statutes, however, apply only to cases where the relation of employer and employee, or master and servant, exists. (*Holden* v. *Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L Ed. 780; *In re Ten-hour Law for Street Railway Corporations*, 24 R. I. 603, 54 Atl. 602, 61 L. R. A. 612.) One of the reasons for holding the law unconstitutional was because there was "no penalty imposed upon the 'officer' or 'agent' who 'exacts' the labor."

"The burden of proving every element of the crime charged in an indictment rests upon the state." (*State* v. *Samuels* (Del.), 67 Atl. 164.) The evidence here conclusively shows that the men alleged to have worked more than eight hours were not servants of the defendant. He exercised no control over the work, except to see that it was done according to the plans and specifications. "A reservation of the employer of the right by himself or his agent to supervise the work merely for the purpose of determining whether it is being done in conformity to the contract does not affect the relation." (Am. & Eng. Ency. of Law, 2d ed., p. 188; *Casement* v. *Brown*, 148 U. S. 615, 13 Sup. Ct. 672, 37 L. Ed. 582; *Vosbeck* v. *Kellogg*, 78 Minn. 176, 80 N. W. 957.)

Mr. Albert J. Galen, Attorney General, and *Mr. W. L. Murphy*, Assistant Attorney General, for Respondent.

MR. CHIEF JUSTICE BRANTLY, delivered the opinion of the court.

The defendant, having been convicted in a justice's court of Yellowstone county of a violation of the provisions of the statute (Revised Codes, secs. 1739, 1740) commonly known as the "Eight-hour Law," appealed to the district court. Upon a trial by that court, without a jury, he was again convicted. He has appealed to this court from the judgment and an order denying his motion for a new trial. The charging part of the complaint is as follows: "In that the said Nick Hughes, then and there being, and being then and there the person named as a contractor in a certain contract theretofore let to him by the city of Billings, Yellowstone county, Montana, for the excavation and construction of that certain sewer, commonly known as the Sixth Avenue sewer, in said city of Billings, did then and there knowingly, willfully, wrongfully, and unlawfully cause, suffer and permit divers and sundry persons, whose names are to this complainant unknown, to render and perform services, work and labor in and upon the construction and excavation of said sewer, for a period of more than eight hours, to-wit, [illegible]

hours, as and for a single day's work and labor, on said seventeenth day of April, 1908, the said persons so rendering and performing said services, work and labor being then and there employed by said Nick Hughes in the prosecution of the excavation and construction of said sewer under and by virtue of said contract so let to him by the said city of Billings, as aforesaid, contrary to the form, force and effect," etc.

Of the various contentions made on defendant's behalf, we are required to notice only one, to-wit, that the evidence is insufficient to sustain the conviction. The statute declares:

"Sec. 1739. A period of eight (8) hours shall constitute a day's work on all works or undertakings carried on or aided by any municipal, county or state government, and on all contracts let by them, and in mills and smelters for the treatment of ores, and in underground mines, and in the washing, reducing or treatment of coal.

"Sec. 1740. Every person, corporation, stock company or association of persons who violate any of the provisions of section 1739 (1) of this Act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred ($100) dollars nor more than five hundred ($500) dollars, or by imprisonment in the county jail for not less than thirty days nor more than six months, or by both such fine and imprisonment."

The work upon which the defendant is alleged to have been engaged was being done on behalf of the city of Billings, and therefore fell within the class of works to which the statute by express terms applies. It was pointed out in *State* v. *Livingston Concrete Bldg. & Mfg. Co.*, 34 Mont. 570, 87 Pac. 980, that it is a valid exercise of legislative power. In considering how its provisions may be violated, this court said: "Manifestly in no other way than by the employee working more than eight hours a day in any of the designated employments, or by the employer causing him to do so." Here is defined and stated the condition calling for its application. The employer is subject to its penalty if he causes his employee to continue his work beyond the prescribed number of hours, and the employee

submitting to the unlawful requirement is likewise subject to it. It is clear, therefore, that the contract relation of employer and employee must exist, and that the particular employment must be one of the classes mentioned in the Act. It includes any work undertaken or aided by the state, a county, or a municipality; but the intention is that, as applied to the employer, the penalty for a violation must nevertheless fall upon the person who causes the employee to violate its provisions. In other words, the person occupying a position of authority over one engaged as an employee and exercising control over him is the employer who comes within the prohibition. If the work is done directly by the state, county, or municipality, through its officers, the officers are responsible; if it is done by the letting of a contract—as is usually the case—the contractor is responsible, because he alone gives personal supervision to the work and exercises control over those employed in their several capacities; and this is so whether the contract contains any stipulation upon the subject or not, for it is the character of the work that brings both the employer and employee within the reach of the law.

The evidence submitted at the trial in the district court discloses the following: On October 9, 1907, a contract was let to the defendant by the city for the construction of the sewer mentioned in the complaint, according to plans and specifications furnished, including excavation, manholes, bulkheads, etc., he to furnish all work and materials required. For the faithful performance of the stipulations of the contract he was required to furnish, and did furnish, to the city an undertaking in the sum of $60,000. The work was to be completed on or before December 1, 1908. The price was to be paid in monthly installments upon estimates by the city engineer, ten per cent upon each estimate to be retained by the city until the completion of the work. There was no reservation in favor of the city whereby it might control the work or dictate the employment of the men necessary to do it. The defendant thereafter sublet by contract with Nelson & Pederson, copartners, all of the work

except that required for the excavation, they undertaking to perform their portion of it in accordance with the plans and specifications furnished by the city. They were required to furnish to defendant security for their faithful performance according to the terms of his contract with the city. The work of excavation was let to one J. J. Palmer, under similar conditions. Payments were to be made by the defendant from month to month upon the same estimates as they were to be made to him by the city. Thereupon Nelson & Pederson and J. J. Palmer began the performance of their respective contracts, the defendant having no further control of the means by which the work was to be accomplished, nor any control of the work except to the extent of seeing that the result was in accordance with the requirements of his contract with the city, both as to the quality of the work and the time within which it was to be completed. Nelson & Pederson and Palmer employed and paid their own men and had exclusive control over and direction of them. The defendant was never present except to overlook the work from time to time to see that the quality of it was meeting the requirements of his contract. There is no controversy but that, if any of the men employed worked longer than eight hours on the day in question, they were not required to do so by Hughes personally, but by Nelson & Pederson or by Palmer.

Upon the assumption that the law was violated—and the evidence is very unsatisfactory on this point—the defendant cannot be held responsible, for he did not at the time of the alleged violation sustain the relation of employer to any of the men employed by Nelson & Pederson or by Palmer. As to him the latter were independent contractors, and were not subject to his will; nor did they represent his wishes except as to the result of the work. (*Jensen* v. *Barbour*, 15 Mont. 582, 39 Pac. 906.) He had no power to dictate to them what men they should hire, what rate of wages they should pay, or what hours of work they should require. In all these particulars they were free from his control and direction, and were solely responsible to their men under the law for the treatment accorded to them.

Under these circumstances the defendant could not be held responsible for the conduct of Nelson & Pederson or Palmer.

The judgment and order are reversed, and the cause is remanded.

Reversed and remanded.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

SCHRODER, APPELLANT, v. MONTANA IRON WORKS, RESPONDENT.

(No. 2,623.)

(Submitted March 11, 1909. Decided March 20, 1909.)

[100 Pac. 619.]

Master and Servant—Personal Injuries—Defective Appliances—Pleadings—Complaint—Sufficiency—Contributory Negligence—Assumption of Risk.

Personal Injuries—Complaint—Contributory Negligence.

1. In a personal injury action the plaintiff need not allege his freedom from contributory negligence; its presence is a matter of defense.

Same.

2. When the complaint in an action to recover damages for personal injuries alleges facts from which, by fair interpretation, negligence on the part of plaintiff, which was a proximate cause of the injury, must be inferred, it is demurrable unless the pleading alleges further facts showing that plaintiff was nevertheless acting with due care.

Same—Master and Servant—Complaint—Assumption of Risk.

3. If the facts stated in the complaint of a servant in an action to recover damages from the master on account of personal injuries fairly support the conclusion that plaintiff assumed the risk, the pleading must be held not to state a cause of action.

Same—Master and Servant—Assumption of Risk—Extraordinary Danger.

4. Beyond the ordinary risks of his employment, the servant does not assume any risk, except by express agreement or where the circumstances are such that he must be presumed to have done so from the fact that he continued in the employment, though the extraordinary danger was known to him or was so obvious that he must be presumed to have had knowledge of it.

Same.

5. A servant has a right to presume that the employer's duty to use ordinary care to furnish him reasonably safe and suitable appliances

has been observed; hence his duty is to yield instant obedience in the use of them, and he will not be held to have assumed the risk of any injury of an unusual danger incident to such use, unless he knew of it, or it was so obvious that he must be presumed to have observed it.

Same—Assumption of Risk—Complaint—Sufficiency.

6. Plaintiff was injured while in the employ of defendant company as a teamster, through the breaking of a chain by means of which a heavy iron casting was being lifted from his wagon. The complaint alleged that the chain was wholly insufficient and unsafe, in that it was not of sufficient size to hold or bear the weight of the casting, all of which was known to defendant but of which plaintiff was ignorant. *Held*, that the allegation was not demurrable as importing that plaintiff had, or should have had, knowledge that the chain's tensile strength was not sufficient to bear the weight of the casting, and that he, therefore, assumed the risk of the danger incident to the weakness of the chain.

Same—Contributory Negligence—Complaint—Sufficiency.

7. Nor was the complaint demurrable as showing that plaintiff was guilty of contributory negligence in going so near to the suspended casting as to be hurt by its fall; it was necessary for him to do so in order to release the chain and thus to complete the task assigned him, and he had a right to assume that the chain would not break.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by Daniel Schroder against the Montana Iron Works for injuries received by plaintiff while in defendant's employ as a teamster. From a judgment for defendant on sustaining a demurrer to the complaint, plaintiff appeals. Reversed and remanded.

Messrs. Breen & Hogevoll, for Appellant.

Messrs. McBride & McBride, for Respondent.

The complaint shows a mature servant employed to move castings with a chain obviously, clearly, apparently, totally, entirely, completely, in a word, wholly, insufficient to hold the particular casting he was about to move, and that in moving that particular casting with such chain the chain broke and the servant was injured. Such pleading shows upon its face an assumed risk on the part of the plaintiff, and the defendant cannot be held liable for any injury sustained by him under such circumstances. (See *Kilroy* v. *Foss*, 161 Mass. 138, 36 N. E. 746; *Rowe* v. *Arnold*, 39 Ind. 24; Labatt on Master and Servant,

sec. 855; *Whitelaw* v. *Memphis etc. Co.*, 16 Lea, 391, 1 S. W. 37; *Missouri P. R. Co.* v. *Baxter*, 42 Neb. 793, 60 N. W. 1044; *Indianapolis etc. Ry. Co.* v. *Wilson*, 134 Ind. 95, 33 N. E. 793; *Durham* v. *Louisville etc. R. Co.*, 16 Ky. Law Rep. 757, 29 S. W. 737.)

The master is not under any duty to warn or instruct servants who have already enjoyed an ample opportunity to become acquainted with the danger. Servants are expected to keep their eyes open, and exercise such reasonable care for their own safety as their situation permits. (4 Thompson on Negligence, sec. 4063; *McClellan* v. *Gerrick*, 48 Wash. 524, 93 Pac. 1087; *Smith* v. *Hecla Mining Co.*, 38 Wash. 454, 80 Pac. 779; *Bier* v. *Hosford*, 35 Wash. 544, 109 Am. St. Rep. 917, 77 Pac. 867, 1 L. R. A., n. s., 283; *Miller* v. *Moran Bros. Co.*, 39 Wash. 631, 81 Pac. 1089; *McGorty* v. *Southern N. E. Tel. Co.*, 69 Conn. 635, 61 Am. St. Rep. 62, 38 Atl. 359; *Moulton* v. *Gage*, 138 Mass. 390; *Larsson* v. *McClure*, 95 Wis. 533, 70 N. W. 662; *Griffin* v. *Ohio & M. Ry. Co.*, 124 Ind. 326, 24 N. E. 888; *Dixon* v. *Western Union Tel. Co.* (C. C.), 68 Fed. 630.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for damages for a personal injury. From the amended complaint we gather the facts, alleged as the ground of recovery, as follows: The defendant corporation owns and conducts a foundry and machine-shop in the city of Butte. The plaintiff was, at the time he was injured, in its employ as a teamster, and in this capacity his office was to haul, from place to place about the premises, heavy machinery and castings whenever in the course of defendant's operations it became necessary. On August 1, 1904, he was directed to move from the foundry to the machine-shop an iron casting weighing about fifteen hundred pounds. Having loaded it upon his wagon, and hauled it to the place designated in the machine-shop, he was engaged in unloading and lowering it to the floor. To enable him to do this he was furnished with an appliance consisting of a crane, blocks, and a chain. The process of unloading was intended to

be accomplished by first lifting the casting from the wagon by means of the appliance mentioned, and holding it suspended by the chain until the wagon was removed, and then lowering it to the floor. The unloading had been accomplished up to the point when it became necessary to lower the casting. It was then suspended about five feet from the floor. To effect this it was necessary that the appliance be loosened, presumably so that the chain would run through the blocks, and thus allow the casting to descend gradually, under plaintiff's control. While the plaintiff was in the act of adjusting the appliance in order to lower the casting, it being necessary for him to take hold of it for that purpose, the chain broke, and the casting fell upon his right leg, so crushing and mangling it that amputation became necessary. The negligence with which defendant is charged is alleged as follows: "That said chain so around said casting, and which was so furnished to this plaintiff for such use, was wholly insufficient and unsafe, in this, to-wit: That the same was not of sufficient size to hold or bear the weight of said casting, and by reason thereof it was not of such strength as was required for such casting, and was too weak to hold the same, all of which was well known to said defendant, and of which this plaintiff was ignorant. Plaintiff further alleges that defendant was guilty of gross negligence in not furnishing this plaintiff a sound, safe, and substantial chain with which to handle said casting, and that but for the gross carelessness and negligence of said defendant in this regard this plaintiff would not have received said injury. Plaintiff further alleges that said appliances, consisting of crane, blocks, and chain, were the property of said defendant, and were furnished for use by said defendant, and that this plaintiff used the same under the direction and orders of said defendant." It is then alleged that by reason of the injury thus suffered the plaintiff was permanently disabled, that he has suffered great mental and physical pain and anguish, and that he has been put to expense for medical treatment, etc. To this complaint the court sustained a general demurrer, and, the plaintiff refusing to plead further, rendered judgment for the defendant. Thereupon plaintiff appealed.

The contentions of counsel in this court present two questions: (1) Does it appear from the allegations of the complaint that the chain was so obviously insufficient to answer the purpose for which plaintiff attempted to use it that he knew, or ought to have known, that its use would be attended with danger, and that he therefore assumed the risk? (2) Did the plaintiff, by approaching the casting while suspended by the chain, voluntarily put himself in such a position that he was caught by its fall and injured, whereas, but for his own negligence in this regard, he would not have suffered any injury?

The rule has been repeatedly announced by this court that in an action for personal injury the plaintiff is not required to allege his freedom from contributory negligence, but that its presence is a matter of defense. (*Cummings* v. *Helena & Livingston S. & R. Co.*, 26 Mont. 434, 68 Pac. 852, and cases cited.) To this general rule is recognized the exception that when the complaint alleges facts from which, by fair interpretation, negligence on the part of the plaintiff, which was a proximate cause of the injury, must be inferred, it will be demurrable, unless the pleading alleges additional facts showing that he was nevertheless acting with due care. The same principles apply when freedom from liability is claimed by defendant on the ground that the plaintiff assumed the risk of the danger arising in the course of the employment in which he was injured. If the facts stated in his pleading fairly support the conclusion that he assumed the risk, it must be held not to state a cause of action. (*Longpre* v. *Big Blackfoot Milling Co., ante*, p. 99, 99 Pac. 131.)

It is contended by counsel for respondent that the allegation that the chain was wholly insufficient and unsafe, in that it was not sufficient in size to hold or bear the weight of the casting, furnishes conclusive ground for the inference that the plaintiff knew that it would be dangerous for him to use it, and hence that any inference of liability on the part of the defendant is excluded. A servant is conclusively presumed to have assumed the ordinary risks of the employment. (Revised Codes, sec. 5243.) This is a part of his contract of service. Beyond this

he does not assume any risk, except by express agreement, or where the circumstances are such that he must be presumed to have done so from the fact that he continued in the employment, though the extraordinary danger was known to him, or was so obvious that he must be presumed to have had knowledge of it. (*Coulter* v. *Union Laundry Co.*, 34 Mont. 590, 87 Pac. 973; *Hollingsworth* v. *Davis-Daly Estates Copper Co., ante*, p. 143, 99 Pac. 142.) In *Hardesty* v. *Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29, this court, through Mr. Justice Holloway, quotes with approval from *Carlson* v. *Northwestern Telephone Exch. Co.*, 63 Minn. 428, 65 N. W. 914, as follows: "Where a large number of men are employed upon the same work, it is essential that reasonable orders, regulating their conduct and assigning to them proper places in which to work, should be given. It is the duty and the right of the master to give orders and direct the places where his servants shall work. Their duty is instant and absolute obedience, unless it be obvious to them that such obedience will expose them to unusual dangers. Dispatch, discipline and the safety of person and property in the execution of work imperatively require that the master should order and the servant obey. It would be practically impossible to carry on a work of any magnitude on any other basis. A workman, when ordered from one part of the work to another, cannot be allowed to stop, examine, and experiment for himself, in order to ascertain if the place assigned to him is a safe one." This may with equal propriety be said of the appliances furnished by the master to his servant. It is the master's duty to use ordinary care to furnish his servant with reasonably suitable and safe appliances. The servant has a right to presume that this duty has been observed. Hence his duty is to yield instant obedience in the use of them, and he will not be held to have assumed the risk of any unusual danger incident to such use, unless he knew of it, or it is so obvious that he must be presumed to have observed it.

The allegation referred to does not import that, at the time he was directed to use the chain in question, the plaintiff had, or should have had, knowledge that its tensile strength was not

sufficient to bear the weight of the casting. Knowledge of its size would not imply such additional information; for the tensile strength of a chain does not depend upon its size alone, but upon a variety of elements, such as the kind and quality of the metal composing it, and the process and skill used in its manufacture. Nor can the presumption that the plaintiff had such knowledge be indulged against him. There is no fact stated furnishing a basis for it, as that he had experience, by previous use of the particular chain, so that he must have known its quality, or such general experience in the use of other similar appliances that he could detect their latent qualities by mere inspection. Besides, if any such presumption should otherwise have been indulged, he alleges his want of knowledge in terms sufficiently explicit to rebut it. Upon the facts stated the plaintiff did not assume the risk. Nor do his allegations justify the conclusion that he was guilty of contributory negligence in going near enough to the suspended casting to release the chain in order to complete the task assigned him; it being necessary for him to do so. If the chain had been of sufficient strength, it would not have broken. Plaintiff had the right to assume that it would not break. Therefore the presumption that the accident would not have occurred but for his own negligence does not arise from the fact that he stood so near the casting when the chain gave way that he was caught by its fall. The complaint is uncertain and indefinite in some of its allegations, but no criticism is made of it in these particulars.

The judgment is reversed, and the cause is remanded to the district court, with directions to overrule the demurrer.

Reversed and remanded.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

CITY OF HELENA, RESPONDENT, v. HALE, APPELLANT.

(No. 2,621.)

(Submitted March 6, 1909. Decided March, 20, 1909.)

[100 Pac. 611.]

District Courts—Trial—Findings—Insufficiency.

Findings—Request for—Duty of District Court.

1. Where, in an injunction suit to prevent an operator of a placer mine from allowing waters charged with tailings, sand and debris to flow into a city sewer, the defendant requested the court to make special findings, the method of procedure adopted by the court in merely marking the findings by the words "Given," "Found," and "Refused," disapproved.

Same.

2. It is the duty of the district court to make findings upon a proper request therefor.

Same—Insufficiency—Defective Findings—Reversal, When.

3. Where the court's findings in an injunction suit were so lacking in substance as to amount to no findings at all, the case is not one of defective findings, but one which will demand a reversal of the decree for failure of findings to justify it.

Appeal from District Court, Lewis and Clark County; Thos. C. Bach, Judge.

ACTION by the city of Helena against Robert S. Hale. From the judgment and an order denying a new trial, defendant appeals. Reversed and remanded.

Mr. Massena Bullard, and *Mr. William Wallace, Jr.,* for Appellant.

Mr. Edward Horsky, for Respondent.

MR. JUSTICE SMITH delivered the opinion of the court.

This is an appeal, by the defendant below, from an order denying him a new trial and from a decree of the district court of Lewis and Clark county, granting plaintiff a perpetual injunction restraining the defendant "from charging or allowing or permitting to be charged the waters flowing in Last Chance

gulch through the flume or storm sewer described in the complaint * * * with sand, tailings, or debris from the mining operations or mining ground of the defendant," and also awarding $250 damages against the defendant. The cause was tried to the court alone.

The complaints, original and supplemental, set forth that the plaintiff has constructed a flume or storm sewer through the city of Helena at great expense, and that the defendant has negligently caused to be deposited large quantities of sand, debris, and tailings in the waters used by him for placer mining purposes above the city, and negligently permitted the water so charged by him with sand, debris, and tailings to flow into and through the sewer, filling the same to such a depth as to injuriously affect its usefulness as a watercourse and wear out the material of which it is constructed, thus causing the city to expend large sums of money for clearing out and repairing the sewer, to its damage in the sum of $10,000. The answer contains a categorical denial of the foregoing allegations, and, in addition thereto, alleges affirmatively, *inter alia,* that in the year 1870, long prior to the incorporation of the city, the defendant acquired a right of way for, and privilege of, running water from his placer mines through the natural channel of Last Chance gulch in the condition in which the same was after being used for mining, and has used and enjoyed such right of way and privilege ever since openly, notoriously, and adversely to all persons whomsoever; that since 1873 Wm. A. Chessman has held the right to the use of the waters from a point above the city, and has "obligated and bound himself to take care of said muddy waters at and below said [point] and is now under obligation so to do"; that at the time defendant acquired his right the gulch was of sufficient grade to carry off the waters without injury to any one, but that the city had so changed the course of the flow by means of the flume as to reduce the grade, "so that it was not capable of carrying mining water to the extent that it was capable of carrying mining water when allowed to run through the natural channel, but that, even as so changed and constructed, said flume would have been sufficient

to have carried and conducted said waters without injury or damage to the city if the flume had been kept clean and clear of obstruction, but that the city permitted the said flume to be obstructed" with rubbish, "by reason of which the flow of water was checked, obstructed, and impeded, * * * and this defendant alleges that the obstruction or overflowing of water through said flume has not been by reason of any fault of defendant, but by reason of the fault of the plaintiff in so changing and lessening the grade of the stream and in permitting the same to be obstructed." These allegations were put in issue by the reply. The bill of exceptions recites that, at the close of the testimony, "the defendant requested the court, in writing, that it make written findings, and asked that his said request be entered in the minutes of the court, which was done, and defendant submitted certain specifications of points on which he desired findings: [Here follows a request for specific findings, not findings on specific points.]" These proposed findings are numbered from 1 to 11. Nos. 1 and 2 are marked "Given," No. 7 is marked "Found," and the others are marked "Refused." Nos. 1 and 2 are purely formal, being covered by stipulations and admissions in the pleadings. No. 7 is to the effect that the plaintiff had some years subsequent to 1887 made a change in its sewer, so that for a distance of over one thousand feet it ran "wholly westward of the original channel and on a different and lesser grade in places and with sharper angles than said channel had, and at points fifty to seventy-five feet away therefrom." This, if it had been properly made, would have been a finding in favor of the defendant. The other requested findings related to questions of fact which were real issues in the case; but did not embody all of the material issues or those which should have been determined in order to deduce those conclusions of law which were the necessary basis for a decree. Even though it be conceded that Nos 1, 2, and 7 as indorsed by the judge are findings of fact, it cannot be said that the word "Refused" written on the margin of the others is anything more than a refusal to make the spe-

cific finding requested. We cannot give our approval to the method of procedure adopted by the court.

But it is contended that this is a case of defective findings, and counsel cites the case of *Bordeaux* v. *Bordeaux*, 32 Mont. 159, 80 Pac. 6. In that case Mr. Chief Justice Brantly said: "There is in the record no bill of exceptions showing that the defendant, at the close of the evidence and argument in the cause, made written request for findings upon the subject of recrimination, *or any other issue.*" But we regard this as a case of total lack of findings, rather than defective findings. The findings, if there are any, are so lacking in substance as to be no findings at all. The defendant properly requested general findings. (Revised Codes, secs. 6763, 6764, 6766.) It then became the duty of the court to make findings. (Revised Codes, sec. 6764, *supra.*) Under the allegations in the pleadings it was very material to inquire to what extent, if at all, the defendant had deposited tailings in the stream. (*Fitzpatrick* v. *Montgomery*, 20 Mont. 181, 63 Am. St. Rep. 622, 50 Pac. 416.) The court should have determined what agency or condition caused the tailings to be deposited in the sewer, and should also have found upon all other material fact issues made by the pleadings, to the end that the parties may be advised of their respective legal rights upon the facts so found. The record is barren of any finding of fact that would justify the entry of the decree. Under the issues made by the pleadings, several important legal questions were raised, and the court should have drawn conclusions of law also. As it is, we have no idea, and the parties can have no idea, of the trial court's notion of what the defendant's legal rights were by virtue of proposed finding No. 7, assuming that the court attempted to adopt it.

As we have no means of knowing what facts will be found on a retrial, we refrain from discussing several other questions of law presented in the briefs of counsel.

The judgment of the district court of Lewis and Clark county and the order denying a new trial are reversed, and the cause

is remanded, with directions to the court below to retry the same.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

DILLON ET AL., RESPONDENTS, *v.* GREAT NORTHERN RAILWAY CO., APPELLANT.

38 485
41 174
41 472
41 479

(No. 2,625.)

(Submitted March 10, 1909. Decided March 23, 1909.)

[100 Pac. 960.]

Railroads — Death by Negligence — Fellow-servant Act—Statutory Construction—Survival Statutes.

Survival Statutes—Nature of.

1. A survival statute presupposes the existence of a cause of action in favor of the deceased; it does not create a new cause of action, but carries forward and preserves to his heirs or representatives the right which deceased had before his demise.

Railroad Employees—Death by Negligence—Fellow-servant Act—Construction—Survival Statute.

2. *Held*, that Chapter 1 of the Session Laws of 1905 (Laws 1905, p. 1 [Revised Codes, sections 5251, 5252]), which provides in section 1 that railroad companies shall be liable for all damages sustained by any of their employees because of the neglect, willful wrongs, etc., of fellow-servants, and in section 2 that in case of the death of any such employee in consequence of any injury so sustained, the right of action shall survive and may be prosecuted and maintained by his heirs or personal representatives, is a survival statute, and does not create a new cause of action in favor of the heirs for damages sustained by them by reason of the death of deceased.

Same—Instantaneous Death—Survival of Action.

3. Where in an action brought by the heirs of a railroad employee, under the provisions of Chapter 1, Laws of 1905, p. 1 (Revised Codes, sections 5251, 5252), to recover damages for the alleged wrongful killing of deceased, the agreed statement of facts showed that his death in a collision was instantaneous, there could not be any survival of an action in the heirs, since, the wrong and the death of decedent having been concident in point of time, no cause of action ever accrued in his favor, and therefore none could survive in the heirs.

Appeal from District Court, Flathead County; J. E. Erickson, Judge.

ACTION by Winifred Dillon in her own right and as guardian of her minor children, against the Great Northern Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Mr. I. Parker Veazey, and *Mr. W. N. Noffsinger,* for Appellant.

Instantaneous death prevents the birth of the deceased's statutory cause of action, and hence also prevents the possibility of survivorship. (*The Corsair* (*Barton* v. *Brown*), 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727; *Kearney* v. *Boston R. R. Corp.,* 9 Cush. 108; *Hollenbeck* v. *Berkshire R. R. Co.,* 9 Cush. 478; *Kennedy* v. *Standard Sugar Refinery,* 125 Mass. 90, 28 Am. Rep. 214; *Moran* v. *Hollings,* 125 Mass. 93.) The negligence complained of, and which constitutes the foundation of the alleged right of action, was not completed while Dillon lived, and, therefore, while his heirs may have a cause of action under another statute, he never had any cause or right of action; and as appellant was never liable to him, under this statute, "for a second of time," it cannot be liable to plaintiffs under the Act of 1905. A right of action which he never had cannot survive and be enforced by his heirs. (*Belding* v. *Black Hills & Ft. P. R. Co.,* 3 S. D. 369, 53 N. W. 750; see, also, cases cited above.)

The manifest purpose of the statute was to give its benefits to employees engaged in the hazardous business of operating railroads. When thus limited it is constitutional; when extended further it becomes unconstitutional. (*Akeson* v. *Chicago B. & Q. R. Co.,* 106 Iowa, 54, 75 N. W. 677; see, also, *Johnson* v. *St. Paul etc. Ry. Co.,* 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419; *Missouri etc. Ry. Co.* v. *Mackey,* 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Chicago etc. R. R. Co.* v. *Pontius,* 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675; *Bucklew* v. *Central Iowa Ry. Co.,* 64 Iowa, 603, 21 N. W. 103.) An employee of a railroad company, whose duties are not extra-hazardous, does not, by merely entering a railroad car to be trans-

ported, come within the constitutional powers of the law-making body of the state, in the exercise of which class legislation of this kind may be lawfully enacted; they are not engaged in an extra-hazardous pursuit; they do not become exposed to any perils, while engaged in the discharge of their duties, which are not always equally shared with them by all other travelers. The above is equally true of an assistant roadmaster; he is not engaged in a perilous pursuit. (*Butler* v. *Chicago etc. R. Co.*, 87 Iowa, 206, 54 N. W. 208.)

The liability created by this statute requires two coexisting conditions to give it birth, viz., there must be an employee injured who, at the time of the accident, was "engaged in the hazardous business of operating railroads," and this injury to such an employee must have been caused by the negligence of another employee, who was, at that time, also employed and engaged in "the use and operation of a railroad." (*Stroble* v. *Chicago etc. Ry. Co.*, 70 Iowa, 555, 59 Am. Rep. 456, 31 N. W. 66; see, also, *Foley* v. *Chicago R. I. & P. Ry. Co.*, 64 Iowa, 644, 21 N. W. 124; *Malone* v. *Burlington C. R. & N. Ry. Co.*, 65 Iowa, 417, 21 N. W. 756, 54 Am. Rep. 11; *Reddington* v. *Chicago, M. & St. P. Ry. Co.*, 108 Iowa, 96, 78 N. W. 800.)

Messrs. Walsh & Nolan, and *Mr. D. F. Smith*, for Respondents.

Assuming that the Act in question is a survival statute, does an instantaneous death forbid a recovery under the statute? The question has been so often determined to the contrary that there is no doubt that the rulings to that effect must be deemed to have been weaved into the statute. The idea comes from some early Massachusetts cases which the courts of this country generally, and even of the neighboring New England states, have declined to follow. (*Broughel* v. *Southern N. E. Tel. Co.*, 72 Conn. 617, 45 Atl. 437, 49 L. R. A. 404.) The same indisposition to follow the reasoning of the Massachusetts cases is found to have prevailed quite generally. Tennessee declined, though as shown in *Roach* v. *Imperial M. Co.*, 7 Fed. 698-704, 7 Saw. 224, its court held that the Act of that state is a sur-

vival statute. (*Nashville etc. R. R. Co.* v. *Prince*, 2 Heisk. 580; *Fawlkes* v. *N. & D. R. R.*, 5 Baxt. 663.) The question was disposed of in New York contrary to the Massachusetts rule, though the statute was treated as though the right of action of the deceased survived to his representatives. (*Brown* v. *Buffalo & S. L. R. Co.*, 22 N. Y. 194.) And Judge Comstock sensibly declared in *Whitford* v. *Panama R. Co.*, 23 N. Y. 465, that there is no such thing as a strictly instantaneous death. The supreme court of South Carolina, likewise, though holding their Act to be a survival statute (*Price* v. *Richmond & Danville R. R. Co.*, 33 S. C. 556, 26 Am. St. Rep. 700, 12 S. E. 413), held that it permitted a recovery whether the death was instantaneous or lingering. (*Reed* v. *Northeastern R. Co.*, 37 S. C. 42, 16 S. E. 289.) In Kentucky a like conclusion was reached. (*Givens* v. *Kentucky C. R. Co.*, 89 Ky. 231, 12 S. W. 257.) The Massachusetts cases are followed in Maine, but the results arrived at have been overcome by recent statutory enactments. The supreme court of South Dakota was convinced by them, however (*Belding* v. *Black Hills etc.*, 3 S. D. 369, 53 N. W. 750), and they were held persuasive in Mississippi. (*McVey* v. *Illinois Cent. R. R. Co.*, 73 Miss. 487, 19 South. 209.) Perhaps little, if anything, could be added to the discussion of the subject on its merits, if it has any, as it is set forth in the opinions referred to. Nor is there any necessity for any close discrimination in the matter, since the statute in question was adopted from the state of Iowa and has been authoritatively construed by the highest court of that state as permitting a recovery in cases of instantaneous death. The supreme court of that state seems to have been originally somewhat persuaded by the reasoning of the Massachusetts cases. (*Sherman* v. *Western Stage Co.*, 24 Iowa, 515.) Later it recognized that there can be no such thing as a strictly instantaneous death. (*Kellow* v. *Central Iowa Ry. Co.*, 68 Iowa, 470, 56 Am. Rep. 858, 23 N. W. 740, 27 N. W. 466.) And finally it squarely adjudicated that the fact that the death was instantaneous was no obstacle at all to recovery. (*Conners* v. *Burlington etc. Ry. Co.*, 71 Iowa, 490, 60 Am. Rep. 814, 32 N. W. 465; *Worden* v. *Humes-*

ton & S. R. Co., 72 Iowa, 201, 33 N. W. 629.) The legislature of this state, adopting the Iowa statute, and being uncertain whether our general survival statutes might not be construed as being as comprehensive as those of Iowa, added to the law a section which would put it past doubt that an action could be maintained against the common employer in the case of a death resulting from the negligence or willful wrongs of a fellow-servant when the wrong was connected with the use and operation of a railway.

Is the law a survival statute? The bare fact that the word "survive" occurs in the statute is not at all controlling. Logically, there can be no such thing as a survival of a right to recover for death. The man who died, never, under any circumstances, whether his death was lingering or instantaneous, had any right of action to recover for his own death. So no action to recover for his death could possibly "survive" in the sense in which the word is used to indicate the right to sue, for instance, on a promissory note given to the decedent. The statute is to be construed in the light of the general legislation on the subject. We are to try to get at what the legislature meant—whether to give a new and independent right of action to the heirs for the death, or whether it intended to carry over to them a right of action which the deceased would have had if he had not died.

It is to be borne in mind that the "general theory of American statutes on this subject is that the action" is "newly created," and is "entirely distinct from any action which the deceased might have had, had he lived." And this for two reasons, namely, that the action is for his death, and he could have no action for that; and second, because it is not fair to enable the heirs to recover the equivalent of all he could earn, and more particularly is it not fair to permit them to recover for the pain and suffering he endured.

We start, then, with the assumption that the legislature had no purpose to depart from the general course and current of legislation on the subject. And, examining the language used, we find it supports the view that they did not intend to do so.

Appellant says that it is the right of action given to the injured servant, referred to in the first section, which is carried over to his heirs or personal representatives—it is his right of action which survives. But the statute does not say "his" right of action survives, but "the" right of action; that is, the right of action lives after him in his heirs or personal representatives. Besides, if it was intended that there should be simply an abrogation of the common-law rule "*Actio personalis moritur cum persona,*" the section would have ended with the word "survive." That would have been sufficient. His right of action would then accrue to his executor or administrator. It was wholly unnecessary to make any further provision. An Act even more equivocal and ambiguous in its language, in view of similar considerations, was held to grant a new right and not to be a survival statute in *Matz* v. *Chicago & A. R. Co.,* 85 Fed. 180-188.

Was the deceased within the class protected by the statute? The great weight of modern authority is to the effect that those engaged in construction or repair work, however it be with the accountant or the lawyer employed by the railroad company, are fellow-servants of the train crews operating the trains on which they ride in going to or from their work, and that for the negligence of the latter, resulting in the injury to the former, there is no right of recovery at common law. (*Texas & Pacific R. Co.* v. *Smith,* 67 Fed. 524, 14 C. C. A. 509, 31 L. R. A. 321; see, also, *Kilduff* v. *Boston etc.,* 195 Mass. 307, 81 N. E. 191, 9 L. R. A., n. s., 873.)

The statute was unquestionably intended for the relief of all those who would be barred of a right of recovery by reason of the fellow-servant rule, who suffered injuries in the use and operation of any railroad in this state, inflicted in the course of their employment. Its benefits are held, in Iowa, to extend to all employees who are engaged in the business of operating railroads, or who are, by the nature of their employment, exposed to the hazard incident to moving trains. (*Smith* v. *Humeston & S. R. Co.,* 78 Iowa, 583, 43 N. W. 545; see, also, *Schroeder* v. *Chicago etc. Ry. Co.,* 47 Iowa, 375; *Rayburn* v.

Central I. Ry. Co., 74 Iowa, 637, 35 N. W. 606, 38 N. W. 520; *Smith* v. *Chicago & G. W. Ry. Co.* (Iowa), 80 N. W. 658; *Chicago, M. & St. P. Ry. Co.* v. *Artery*, 137 U. S. 507, 11 Sup. Ct. 129, 34 L. Ed. 747.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought by Winifred Dillon in her own right, and as guardian of her minor children, against the Great Northern Railway Company to recover damages for the alleged wrongful killing of Thomas Dillon, the husband of Winifred Dillon and the father of the minor children. The cause was submitted to the district court upon an agreed statement of facts. The facts agreed upon, so far as necessary to be considered on this appeal, are that Thomas Dillon was employed as assistant roadmaster by the defendant, which is a railroad company engaged as a common carrier of freight and passengers between St. Paul and Seattle; that on September 20, 1906, while Dillon was properly riding in the caboose of a freight train, east-bound from Whitefish, the caboose in which he was riding was run into by another east-bound train, "and, by reason of said collision, the said Thomas Dillon was instantaneously and immediately killed, and did not live or survive for a second of time after said accident; that said collision and the resultant instantaneous killing of the said Thomas Dillon was due to the negligence and carelessness of employees of said defendant railway company, who were fellow-servants of the said Thomas Dillon; * * * that said collision, resulting in the instantaneous killing of said Thomas Dillon, was not in any manner, or to any extent whatever, due to the negligence of the said Thomas Dillon, or of said defendant railway company." From a judgment rendered and entered in favor of the plaintiffs, the defendant railway company appeals.

1. It was a rule at common law that, if one person was injured by the wrongful act of another, he had a right of action against the wrongdoer for damages sustained by him: (a) If the injured party died before bringing his action, the cause of

action literally died with him; (b) if he brought his action, but died before judgment, the action abated with his death; (c) if the injuries were occasioned by the negligence of his fellow-servant, the injured party could not recover from the common employer, if that fact appeared. The rule is recognized and enforced in this country generally; in some of the states as a rule of the common law, while in others it is embodied in statutes. However, in practically every state the rule has been modified by abolishing subdivisions (a) and (b), and substituting in lieu thereof provisions by which, in case of the death of the injured party, his heirs or personal representatives may prosecute his right of action, and recover for the benefit of his estate. These statutes are commonly designated "survival statutes." In some of the states the rule is further modified by permitting recovery from the common master by one servant whose injuries are occasioned by the negligence of a fellow-servant. Statutes making this qualification are generally referred to as "fellow-servant statutes." The above rule of the common law, as modified by our general survival statute (sec. 6494), and our fellow-servant statute (secs. 5251, 5252, Revised Codes), has been recognized and enforced in this state. Every survival statute presupposes the existence of a cause of action in favor of the injured party. Such a statute does not create a new cause of action, but only carries forward the right which the injured party had before his death.

2. It was also a rule of the common law, generally speaking, that for the death of one person caused by the wrongful act of another there was not any remedy by civil action. Because of the harshness of this rule the English parliament in 1846 enacted a statute (Stats. 9 & 10 Vict., c. 93), generally known as "Lord Campbell's Act." This Act is the model after which a like statute has been enacted in nearly every state in this Union. While our statutes may vary from the English Act in some minor particulars, they are all framed with the same general purpose in view, viz., to give to certain kindred of the deceased a right of action for damages which *they* sustain by reason of the death of the deceased. Our statute is found in

section 6486 of the Revised Codes, and, while it bears slight resemblance to the English statute, the general purpose is the same.

To mention the fact is sufficient to call attention to the marked distinction between an action prosecuted under the common-law rule first above mentioned and one prosecuted under Lord Campbell's Act. In the first case the injured party seeks compensation for his mental and physical pain and suffering, for medical attention, for loss of time, and for decreased earning capacity. In the second case the kindred seek compensation for such portion of the deceased's earnings as would have come to them had he lived, and, possibly, for the loss of companionship and the like. In the first case the damages sought are the damages which the injured party himself sustained. In the second case the damages sought are those which his kindred sustained.

But to avoid the defense that Dillon's injuries resulted from the negligence of his fellow-servants, this action is prosecuted under the provisions of our fellow-servant statute above. It is an Act of the ninth legislative assembly (Laws 1905, p. 1), and provides:

"Section 1. Every person or corporation operating a railway or railroad in this state, shall be liable for all damages sustained by any employee of such person or corporation in consequence of the neglect of any other employee or employees thereof, or by the mismanagement of any other employee or employees thereof, and in consequence of the willful wrongs, whether of commission or omission, of any other employee or employees thereof, when such neglect, mismanagement or wrongs, are in any manner connected with the use and operation of any railway or railroad on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding.

"Section 2. In case of the death of any such employee in consequence of any injury or damage so sustained, the right of action shall survive and may be prosecuted and maintained by his heirs or personal representatives."

The Act is carried forward into the Revised Codes as sections 5251 and 5252. It may be an open question whether the legislature intended to create a new cause of action, or only intended to abolish the defense of the negligence of a fellow-servant. But, assuming that it was the intention to create a new cause of action, our first inquiry then is: In whose favor does such cause of action arise? It is argued by counsel for respondents that it arises in favor of the heirs, and, but for their earnest contention, we would deem the answer to this question so manifest from the statute itself as not to require serious consideration. In the first instance the title of the Act indicates the purpose of the legislation. The title reads: "An Act to determine the liability of persons or corporations operating railways or railroads in this state for damages sustained by employees thereof, and to declare void contracts restricting such liability." The avowed purpose is to provide for determining the liability of railroad companies to their employees for damages sustained by the employees—not for damages sustained by their heirs. The first section of the Act emphasizes this view. It provides that the railroad company shall be liable for all damages sustained *by any employee,* and, practically to conclude argument upon this question, it provides that "no contract which restricts such liability shall be legal or binding." Counsel for respondents, however, seem to rely chiefly, if not altogether, upon the second section; but we are unable to find any suggestion here which sustains their view. This section seems to us exceedingly plain. It does not mention any new cause of action. It only refers to *the right of action.* What right of action? Clearly, the right of action recognized by the first section. The expressions "such employee" and "injury or damage so sustained" either refer to the same subjects in the first section, or they are absolutely meaningless. That these expressions and "the right of action" do refer to the kindred subjects in the first section we entertain no doubt. This second section is clearly a survival statute, and was intended for nothing else.

The manifest purpose of the whole Act is to enable an employee of a railroad company to recover damages from the com-

pany for injuries inflicted upon him by reason of the negligence of a fellow-servant, and, in case death results from such injuries after the cause of action has accrued, then to enable his heirs or personal representatives to prosecute the action to judgment. If it was intended to create a new cause of action in favor of the heirs for damages sustained *by them,* the legislature certainly did not give any intimation of such intention in the title of the Act, and securely concealed such intention in the body of the statute. If such intention was expressed in the body of the statute, it is exceedingly doubtful whether that part of the statute would be effective, since the title does not cover that feature at all; but we hold that such intention is not expressed either in the title or body of the Act. The Act does not create a cause of action in favor of the heirs.

While we feel reasonably certain that the complaint in this action was framed upon the theory that the action is one to recover the damages which these kindred suffered on account of Dillon's death, we are not absolutely satisfied that this was the intention of the pleader, and we are led, therefore, to consider a second question—and this one arises upon the assumption that this is an action to recover damages which resulted to Dillon's estate as a consequence of his death—and that question is: Does the agreed statement of facts show a cause of action in favor of Dillon which survived his death? The agreed statement shows that Dillon's death was instantaneous, and that he did not survive for a second of time after the accident.

Our general survival statute (section 6494 above) relates to a cause of action which "arose in favor of such party prior to his death." Section 2 of the Act of 1905 provides that, in case of the death of the employee in consequence of an injury sustained as set forth in section 1, then the right of action for damages occasioned by such injury shall survive. It goes without saying that a thing which never existed cannot survive. In order for the right of action to survive it must have existed, and the legislature understood these matters, and used the term "survive" accordingly. Of course, it is elementary that a cause of action cannot exist in favor of a deceased person. In using

the phrase "in consequence of any injury," then, we think the legislature meant to express the same idea that is expressed in the general survival statute above; and the meaning of this Act of 1905 is that, if a cause of action arose in favor of the injured employee prior to his death, the right of action which he thus had survives, and may be prosecuted by his heirs or personal representatives. Did a cause of action arise in favor of Dillon prior to his death?

A cause of action is the right which a party has to institute a judicial proceeding. (*Meyer* v. *Van Collem*, 28 Barb. (N. Y.) 230.) As applied to a tort, it is composed of the right of the plaintiff and the wrong of the defendant (*Veeder* v. *Baker*, 83 N. Y. 156), and the wrong of the defendant is the infringement of plaintiff's right. (*Atchison, T. & S. F. R. Co.* v. *Rice*, 36 Kan. 593, 14 Pac. 229.) To constitute a cause of action for a tort, then, the plaintiff's right must have been infringed by the wrongful act of the defendant, with the result that plaintiff suffered damages. With these elementary principles before us the question recurs, Is it possible for one who is instantly killed to have a cause of action for the wrong which caused his death? The very statement of the question would seem to suggest its own answer. Since there is not any appreciable length of time between the wrong and the death, or, in other words, the wrong and the death being coincident in point of time, the instant the wrong is committed the victim of the wrong has ceased to exist, and it seems impossible that there is any cause of action in favor of such victim. This conclusion seems inevitable when the elements which are to be considered in determining the measure of damages are taken into account. Those elements are physical and mental pain and suffering, expense of medical attendance, loss of time, and decreased earning capacity. In the case of instant death every one of these elements is absent. To presume the existence of any one of them is to presume that life did not become extinct until some appreciable time had elapsed after the wrong was committed, a fact which is negatived by the agreed statement of facts in this case.

In their brief counsel for respondents, in referring to the Act of 1905, say: "If it be assumed that this is a survival statute, giving a right of action to the heirs or personal representatives for all that the estate of the deceased lost by his death, the respondents dispute that there is no right of recovery because the death was instantaneous"—and they cite cases which they contend support this view. The first case is *Broughel* v. *Southern N. E. Tel. Co.*, 72 Conn. 617, 45 Atl. 437, 49 L. R. A. 404, but in that case the court was considering a statute which provides: "All actions for injury to the person, whether the same do or do not instantaneously or otherwise result in death * * * shall survive to his executor or administrator." In the opinion it is intimated that the insertion of the words "instantaneously or otherwise" did not change the meaning of the prior statute, but this is *dictum*, and whether it is or is not a proper construction of the earlier statute we need not stop to inquire.

In *Nashville etc. R. Co.* v. *Prince*, 2 Heisk. (Tenn.) 580, a peculiarly worded statute of Tennessee was considered. The court held that the statute creates a cause of action in favor of certain heirs of the deceased for damages suffered by them on account of the death of the deceased. If this is the correct construction of the statute, then, of course, it was wholly immaterial that the death of the deceased was instantaneous.

In *Fowlkes* v. *N. & D. R. R. Co.*, 5 Baxt. (Tenn.) 663, the same court considers the same statute that was considered in the *Prince Case* above, but, without referring to that case, apparently reaches a different conclusion as to the meaning of the statute. The question decided is with reference to the statute of limitation, but the court seems to hold that recovery could be had under a survival statute, in case of instantaneous death.

In each of the following cases, cited by counsel for respondents, a statute patterned after, and similar to, Lord Campbell's Act was considered. (*Roach* v. *Imperial M. Co.* (C. C.), 7 Fed. 698, 7 Saw. 224; *Price* v. *Richmond etc. R. Co.*, 33 S. C. 556, 26 Am. St. Rep. 700, 12 S. E. 413; *Reed* v. *Northeastern R. Co.*, 37 S. C. 42, 16 S. E. 289; *Brown* v. *Buffalo & S. L. R. Co.*, 22

N. Y. 191; *Whitford* v. *Panama R. Co.*, 23 N. Y. 465.) Lord Campbell's Act is entitled "An Act for compensating the families of persons killed by accidents." It is not in any sense a survival statute, but creates a new cause of action in favor of the kindred of the deceased.

In *Blake* v. *Midland Ry. Co.*, 18 Adol. & E., n. s., 93, the court of queen's bench said: "Reliance was placed upon the first section, which states in what cases the newly given action may be maintained although death has ensued, the argument being that the party injured, if he had recovered, would have been entitled to a *solatium*, and therefore so shall his representatives on his death. But it will be evident that this Act does not transfer this right of action to his representative, but gives to the representative a totally new right of action on different principles. Section 2 enacts that 'in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought.' The measure of damage is not the loss or suffering of the deceased, but the injury resulting from his death to his family." That this is the correct construction of the English statute is manifest, and is almost universally recognized by the courts of this country. (*Peers* v. *Nevada P. L. & W. Co.* (C. C.), 119 Fed. 400; *Hurlbert* v. *City of Topeka* (C. C.), 34 Fed. 510; *Schwarz* v. *Judd*, 28 Minn. 371, 10 N. W. 208; *Perkins* v. *Oxford Paper Co.* (Me.), 71 Atl. 476; *Vicksburg etc. R. Co.* v. *Phillips*, 64 Miss. 693, 2 South. 537.)

In a dissenting opinion in *Whitford* v. *Panama R. Co.*, above, Chief Justice Comstock construes Lord Campbell's Act as a survival statute—a conclusion directly opposed to that reached by the English courts, and opposed to the decided weight of authority in this country. He also asserts that there is not any such thing as instantaneous death. It is to this dissenting opinion that our attention is particularly directed by counsel for respondents; but we are unable to agree with either of the conclusions reached by the learned jurist.

In *Givens* v. *Kentucky Cent. R. Co.*, 89 Ky. 231, 12 S. W. 257, a statute somewhat similar to Lord Campbell's Act, but made applicable only to railroad companies, was treated.

An action brought under a statute similar to the English statute seeks to recover damages for the death of the decedent, and, of course, in every such action it is wholly immaterial that the death was instantaneous, but decisions of courts treating cases arising under those statutes are not authority in a case arising under a survival statute.

But, speaking further of our Act of 1905, counsel for respondents say: "Nor is there any necessity for any close discrimination in the matter, since the statute in question was adopted from the state of Iowa, and has been authoritatively construed by the highest court of that state as permitting a recovery in cases of instantaneous death." Four Iowa cases are cited. The first of these is *Sherman* v. *Western Stage Co.*, 24 Iowa, 515, and in the principal opinion by Justice Cole the views of Chief Justice Comstock above, upon the subject of instantaneous death, are referred to with approval. A peculiar feature of this case is that the principal opinion is not the majority opinion upon a number of propositions; that is to say, a majority of the court dissented from Justice Cole's views. The case is not authority upon any question involved here. Furthermore, the statute therein considered (Iowa Code, sec. 4111) does not bear the slightest resemblance to our Act of 1905. It is quoted in full, and of it Justice Cole says: "This is the whole of our statute upon the subject. It was enacted by our legislature after the English statute (Stats. 9 & 10 Vict., c. 93 [Lord Campbell's Act]), and after the New York statute (Laws 1847, p. 575, and Laws 1849, p. 388) upon the same subject, and is much more concise and brief than either."

Kellow v. *Central Iowa Ry. Co.*, 68 Iowa, 470, 56 Am. Rep. 858, 23 N. W. 740, on rehearing 68 Iowa, 470, 56 Am. Rep. 858, 27 N. W. 466, is next cited, and in the opinion it is said: "The finding is that 'his [Carter's] death was of that nature *commonly* known as "instant death."' A death is not necessarily instantaneous in fact because it is of that nature. If the injury

which caused the death is necessarily fatal, and death results in a few moments from it, it would no doubt be commonly called an instant death; but, as the person survived the injury for that brief period, it cannot be said that the death was instantaneous. The evidence shows that Carter survived the injury for a few moments." And on rehearing it is said: "We have examined the evidence contained in the record, and are satisfied that without conflict it establishes the facts substantially as stated in the opinion. It shows beyond controversy, we think, that the death was not simultaneous with the injury. We concede that the time between the two occurrences was brief, perhaps not exceeding three to five minutes. Our holding on the question considered is based, however, not on the length of time that Carter survived the injury, but upon the fact that he lived after it occurred."

In *Conners* v. *Burlington etc. Ry. Co.*, 71 Iowa, 490, 60 Am. Rep. 814, 32 N. W. 465, the court considered the case under sections 2525-2527 of the Iowa Code of 1873. Section 2525 is a general survival statute. Section 2526 is a general liability statute, couched in rather peculiar terms, while section 2527 again makes provision for the survival of the right of action. While this was a case of instantaneous death, the fact that it was is not dwelt upon at all; and, while recovery was permitted, it is difficult to understand whether it is upon the theory that a cause of action accrued to the deceased and survived, or whether upon the theory that the death of the deceased gave rise to a cause of action under section 2526. The statutes considered in this case have no resemblance to our Act of 1905.

The last of these Iowa cases cited is *Worden* v. *Humeston etc. R. Co.*, 72 Iowa, 201, 33 N. W. 629. In the opinion there is not any reference to any statute at all. The complaint alleged that the intestate was instantly killed, and the defendant asked for a peremptory instruction in its favor. The court says: "The court refused to give this instruction, and the defendant assigns the refusal as error. The question here presented was raised in the case of *Conners* v. *Burlington C. R. & N. Ry. Co.*, 71 Iowa, 490, 60 Am. Rep. 814, 32 N. W. 465, and ruled adversely to the

position taken by the defendant. The court did not err, we think, in refusing the instruction." This is the only reference to any question involved in the case which we have now before us.

In section 1307 of the Iowa Code of 1873, we find a statute similar to our Act of 1905. This statute was in force at the time each of the last three cases above was decided, but it is not mentioned in any of them; and, so far as we can determine, every one of those cases appears to have been prosecuted under the statute mentioned in the *Conners Case,* and not under section 1307 above. Under the most favorable view, all that can be said is that the *Conners Case* seems to imply that a cause of action arises in case of instantaneous death, and that, too, probably under a survival statute, and this is followed in the *Worden Case.* The *Kellow Case* was not a case of instantaneous death, and the *Sherman Case* arose under a statute similar to Lord Campbell's Act. Reference is made in respondents' brief to the case of *Minneapolis & St. L. Ry. Co.* v. *Herrick,* 127 U. S. 210, 8 Sup. Ct. 1176, 32 L. Ed. 109, for the Iowa statute similar to our law of 1905. The case does not present any question involved here. It only decides that the Iowa statute is not in conflict with the fourteenth amendment to the Constitution of the United States. The foregoing are all the cases cited by respondents in favor of their contention that this action can be maintained under our statute of 1905, even though Dillon met instantaneous death.

Having reached the conclusion that our Act of 1905 is a survival statute, it is interesting to know the definite conclusions reached by the courts in actions of this character, where death was instantaneous. We undertake to say that every survival statute presupposes that the deceased had at one time a right of action for damages occasioned by his injuries, and that he either commenced his action, and died before it went to judgment, or, having the right, he died before he exercised it.

In speaking of an action by the administrator to recover damages in a case of instantaneous death, brought under a survival statute of Massachusetts, Chief Justice Shaw said: "In the

first case, where the casualty relied on as the cause of action and the death of the party injured were simultaneous, it seems clear that the right of action cannot survive. The case contemplated by the statute must be of such a nature that the party injured must himself have, at some time, had a cause of action. The cause of action must accrue during the lifetime of the party injured. Here there was no time, during the life of the intestate, at which a cause of action could accrue, because the life closed with the accident from which a cause of action would have otherwise accrued." (*Kearney, Admx.*, v. *Boston etc. R. Co.*, 9 Cush. (Mass.) 108.) This case has been followed uniformly by the Massachusetts court. (*Moran* v. *Hollings*, 125 Mass. 93; *Corcoran* v. *Boston & A. R. Co.*, 133 Mass. 507; *Riley* v. *Connecticut R. R. Co.*, 135 Mass. 292.)

In considering an action of this character, brought under a survival statute, the supreme court of Mississippi, in *Illinois C. R. Co.* v. *Pendergrass*, 69 Miss. 425, 12 South. 954, said: "If as we have declared, the statute was framed to prevent the abatement of the right of personal action by the death of the injured person, then it bears its own natural construction upon its face. And if no strained or hidden meaning is to be imparted to the language of the statute, the survivorship is to personal actions which the testator or intestate might have commenced and prosecuted. But the testator or intestate could never have begun or prosecuted an action for injuries which ended in instantaneous death. To put the case in another form —the form in which the declaration presents it—can a recovery be had by the personal representative for the mental and physical pain and anguish endured by the deceased at the time of and following the injury complained of, where the death and the injury were simultaneous? The proposition is so self-contradictory and self-confuting as to be confusing. It appears unnecessary to pursue the thought. We are of the opinion that the personal representative has no right of personal action where the deceased never had such right, and that, where death was simultaneous with injury, it is impossible, to the healthy mind, to even conceive of a right of action in the man instantaneously

killed." This case is followed, and the doctrine of it approved, in *McVey* v. *Illinois C. R. Co.*, 73 Miss. 487, 19 South. 209. Under a survival statute in Kentucky the same conclusion was reached. (*Hansford's Admx.* v. *Payne & Co.*, 11 Bush (Ky.), 380.) In *Belding* v. *Black Hills etc. R. Co.*, 3 S. D. 369, 53 N. W. 750, construing a survival statute, the same conclusion is reached, and the court quotes with approval the opinion in *Kearney* v. *Boston etc. R. Co.*, above.

In order that these heirs could have prosecuted this action under the Act of 1905, which we have determined is a survival statute, it was necessary that it appear that the cause of action arose in favor of Dillon himself prior to his death; and, as his death was instantaneous, it seems to us impossible that such a cause of action could arise in his favor for the wrongful act which caused his death, and, as such cause of action did not arise prior to his death, we hold that there was not any survival of a right of action.

Other questions are propounded by counsel for appellant, as, for instance, whether the Act of 1905 is not unconstitutional if applicable to railway employees generally, as was intimated in *Stroble* v. *Chicago, M. & St. P. Ry. Co.*, 70 Iowa, 555, 59 Am. Rep. 456, 31 N. W. 63, and whether it is not necessary that willful wrongdoing shall be shown to accompany negligence or mismanagement, in order to state a cause of action under the Act of 1905. It is not necessary to determine either of these questions in this instance; but it is sufficient to say that, while the object of the Act of 1905, in principle, is praiseworthy, it is couched in such language as to make it practically meaningless, or at least to so far obscure its meaning as to make it of little or no practical use, and to say that a similar statute has been in force in another state for many years does not cure the defects in the Act, or add to its efficiency.

The judgment is reversed, and the cause is remanded to the district court, with directions to dismiss the case.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

ON MOTION FOR REHEARING.

(Submitted April 16, 1909. Decided April 29, 1909.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

A motion for rehearing has been submitted, but the same is overruled. Upon further consideration, however, we think there is not any room for doubt that in enacting sections 5251 and 5252, Revised Codes, the legislature did not intend to create any new right of action, but merely recognized a right of action existing at common law, and sought to make that right available, notwithstanding the negligence of a fellow-servant.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

WILSON ET AL., APPELLANTS, v. YEGEN BROS. ET AL., RESPONDENTS.

(No. 2,634.)

(Submitted March 12, 1909. Decided March 24, 1909.)

[100 Pac. 613.]

Partnership—Fictitious Name—Certificate—Disability to Sue—Waiver—Evidence—Admissibility—Quantum Meruit—Pleading.

Partnership—Action by Partners in Individual Names.

1. In the absence of express statutory authority permitting an action to be brought in the name of a copartnership, a suit involving a partnership claim was properly instituted in the names composing the partnership.

Same—Fictitious Name—Statutory Provisions—Disability to Sue—Waiver.

2. Where the fact that plaintiffs were copartners did not appear from the face of the complaint, and the objection that they had no legal capacity to sue, inasmuch as they were doing business under a fictitious name and had failed to file the certificate required by section 5504, Revised Codes, was not taken by answer (*Id.*, sec. 6538), defendants will be deemed to have waived the objection; and the fact that they did not know that plaintiffs were partners until after one of their witnesses had testified to that effect was immaterial, since it was not too late then to ask leave to amend the answer so as to raise the question.

Same—Fictitious Name—What does not Constitute.

3. The firm name of "A. & B.," used to designate a copartnership composed of two individuals, is not a fictitious name or a designation not showing the names of the persons interested as partners.

Same—Disability to Sue—Evidence—Admissibility.

4. In an action on a *quantum meruit* to recover for materials furnished and work done, the substituted defendants claimed that the amount sued for was due to a third person against whom they had unsatisfied judgments, which they thus sought to collect. The evidence showed that the judgment debtor, who had been acting as foreman for plaintiffs, had no interest whatever in the subject of the suit. *Held*, that defendants could not complain of a ruling of the district court refusing to permit them to show that plaintiffs had failed to file the certificate required to be filed by partners doing business under a fictitious name; the defeat of plaintiff's claim on this ground would not have aided defendants, who could recover only by showing that the money sued for belonged to the judgment debtor.

Same—*Quantum Meruit*—Pleading.

5. In an action upon a *quantum meruit* for work done and materials furnished, properly brought by plaintiffs in their individual names, it was not necessary to allege that the cause of action accrued to them as copartners.

Appeal from District Court, Park County; Sydney Fox, Judge.

ACTION by H. I. Wilson and others against Yegen Bros. and others. From an order granting a new trial, plaintiffs appeal. Reversed and remanded.

Mr. Dan Yancey, for Appellants.

Mr. Fred. L. Gibson, and *Mr. John T. Smith*, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought by Wilson, Hinds, and Cook against the Park county free high school, a body corporate, to recover $852.09 for work done and materials furnished in constructing a concrete sidewalk about the high school grounds in Livingston. Thereafter the money was paid into court, and Yegen Bros. and Cothrin & Todd were substituted as defendants in the place of the Park county high school. The answer of Yegen Bros. is a general denial and an affirmative defense, to the effect that the work was done and materials furnished by Ben Hager, and

not by the plaintiffs or any of them; that defendants have an unsatisfied judgment against Hager for something over $600, and they ask that they recover an amount sufficient to satisfy their judgment. The answer of Cothrin & Todd is similar to that of Yegen Bros. They have an unsatisfied judgment against Hager for about $600, and seek to recover an amount sufficient to satisfy their judgment. The affirmative allegations of these answers were put in issue by reply.

At the trial, A. B. Cook, one of the plaintiffs, was the only witness. He testified, in substance, that the plaintiffs furnished the materials and paid for the work in question; that Ben Hager was their foreman or superintendent, employed at a salary of $150 per month, and, in addition thereto, was to receive twenty-five per cent of the profits, if any, arising from work done of that character; that it was the intention of the plaintiffs to form a corporation to be known as the "Montana Concrete Construction Company"; that this intention was not carried out, but in the meantime the plaintiffs took some contracts and did some work—that some of the contracts were taken in the name of the Montana Concrete Construction Company and some in the name of Ben Hager; that it was understood and agreed between the plaintiffs that, while thus carrying on the work, they should share equally the profits and losses of the business; that there were not any profits in the business, but large losses, which were shared by plaintiffs equally; that the contract for the work in question was taken in the name of Hager, but that Hager did not have any interest in it, except as the agent of the plaintiffs and to get his salary while the work was being done, and to get his share of the profits, if any there had been. Upon cross-examination counsel for defendants sought to show that the plaintiffs had never made and filed the certificate required by sections 5504, 5505, Revised Codes, to be filed by partners doing business under a fictitious name, but the evidence was excluded.

The defendants having declined to introduce any evidence, the court found the issues in favor of the plaintiffs, and rendered judgment accordingly. The defendants thereafter moved for a

new trial, specifying, as the grounds of the motion, errors of law occurring at the trial, insufficiency of the evidence to justify the decision of the court, and that the decision is against law. The particular errors relied upon are set forth at length in the bill of exceptions.

The first four specifications relate to the refusal of the court to permit defendants to show that plaintiffs had not filed the certificate mentioned in sections 5504, 5505, Revised Codes. The other alleged errors are as follows:

"(5) The court erred in overruling the defendants' demurrer to the evidence, and in ordering and granting a judgment in favor of the plaintiffs in this action.

"(6) The court erred in refusing to declare the law to be that the plaintiffs had not proved the material allegations of their complaint, and were not entitled to recover in this action.

"(7) The evidence is not sufficient to sustain the judgment and finding of the court. (a) The evidence wholly fails to show that the plaintiffs, as individuals, or in any other capacity than as copartners, did or performed the work and labor, and furnished materials for the Park county free high school, or that they were otherwise, as individuals, entitled to recover in this action. (b) The evidence shows conclusively that the plaintiffs were copartners at the time the work was done and performed by Ben Hager for the Park county free high school, and that the said Ben Hager was the agent of the plaintiffs, as partners, in the construction of the sidewalk mentioned in the complaint."

The court granted the motion for a new trial, and the plaintiffs appeal from the order.

In deciding the case in favor of the plaintiffs in the first instance, the trial court found that the evidence given by Cook was true, and this is not questioned by defendants at all; on the contrary, in their specifications "a" and "b" above they seem to accept his evidence as true. They did not ask for a new trial upon the ground that Cook's testimony was not true. By their specifications above they practically concede that Cook was a witness entitled to full credit, and as such his evidence

was sufficient to prove the facts with relation to which he testified. Assuming, then, that Cook's testimony is true, it establishes the facts that he, Wilson, and Hinds were copartners in this transaction with the Park county high school; that they took the contract in the name of Ben Hager; that Hager was merely their agent, and did not have any interest in the contract; that the plaintiffs furnished the materials and paid for the labor; that they have not been paid for the work and the value of the materials furnished and work done. It is difficult to conceive of anything more necessary to make out a *prima facie* case in an action of this character, and there is not any merit in specifications 5 and 6 above. We are driven to believe, then, that in granting a new trial the district court must have concluded that an error of law had been committed, to the injury of the defendants.

The only alleged error of law mentioned in the bill of exceptions arises upon the refusal of the trial court to permit the defendants to show that the plaintiffs had not filed the certificate required by the statute to be filed by partners doing business under a fictitious name. Assuming, without deciding, that the copartnership composed of Cook, Wilson, and Hinds was doing business in this instance under a fictitious name, the ruling of the trial court above is directly before us for review. There cannot be any error predicated upon the action of the plaintiffs in bringing this action in their names as individuals. There is not any statute in this state authorizing an action to be brought in the name of a copartnership. (*Doll* v. *Hennessy Mercantile Co.*, 33 Mont. 80, 81 Pac. 625.) On the contrary, every action shall be prosecuted in the name of the real party in interest. (Revised Codes, sec. 6477.) In 15 Encyclopedia of Pleading and Practice, 839, the rule is announced as follows: "At common law a partnership or firm is not regarded as a legal entity apart from its members, and as it is a general rule that actions can only be brought by and against persons natural or artificial, and partnerships are not considered persons, it is almost universally held that, in the absence of express statutory authority, all actions and suits involving partnership claims or

liabilities must be brought by or against the persons individually who compose the firm." Therefore, since this action was properly brought by plaintiffs in their individual names, the fact that the evidence disclosed that they were partners is immaterial.

Section 5504 requires that every partnership doing business in this state under a fictitious name shall file with the county clerk of the county in which is the principal place of business a certificate, giving the names of the members, etc. Section 5505 provides that persons doing business as partners contrary to the provisions of section 5504 shall not maintain any action, in the courts of this state, upon or on account of any contract made or transaction had in the partnership name. It will be observed at once that the penalty thus imposed is the incapacity to sue. Section 6534 provides that the defendant may demur to a complaint when it appears from the face thereof that the plaintiff has not legal capacity to sue. Section 6538 provides: "When any of the matters enumerated in section 6534 do not appear upon the face of the complaint, the objection may be taken by answer." Section 6539 provides: "If no objection is taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

In the case before us, the fact that plaintiffs were copartners does not appear from the face of the complaint, and, as the question of their legal capacity to sue was not raised by answer as provided in section 6538 above, the defendants must be deemed to have waived that defense under section 6539 above. These same statutes have been in force in California for many years, and have uniformly received this construction. (*Phillips* v. *Goldtree*, 74 Cal. 151, 13 Pac. 313; *Carlock* v. *Cagnacci*, 88 Cal. 600, 26 Pac. 597; *Cook* v. *Fowler*, 101 Cal. 89, 35 Pac. 431.) Under our statute prescribing the conditions upon which foreign corporations may do business in this state the same question arises, and in *Zion Co-op. Mercantile Assn.* v. *Mayo*, 22

Mont. 100, 55 Pac. 915, this court reached the conclusion announced above.

It is not any excuse that the defendants did not know that plaintiffs were partners until Cook testified. If they could raise the question at all, it was not too late then to ask leave to amend their answers to raise it, and this they did not do. But it is very doubtful whether these substituted defendants could raise the question at all. The transaction was not between plaintiffs and defendants, but between plaintiffs and the high school. But for a stronger reason the defendants cannot complain of the ruling of the district court in excluding this evidence. These defendants claim as judgment creditors of Hager, and not otherwise. They could only prevail by showing that the money in question belonged to Hager. It would not aid them in the least to defeat the plaintiff's claim upon this ground, for that would not make the money Hager's. Furthermore, the evidence offered by plaintiffs shows that Hager has not any interest in this money, and, as defendants failed to offer any evidence in support of their affirmative defense, this fact must be deemed proved, and, if proved, then defendants have not any interest in the money, since they claim only as judgment creditors of Hager.

The conclusion reached in *McCord* v. *Seale*, 56 Cal. 262, is directly opposed to that which this court would reach upon the same facts if it followed its former decision. The firm name McCord & Malone, used to designate a copartnership composed of James McCord and Frank Malone, is not a fictitious name or a designation not showing the names of the persons interested as partners (*Guiterman* v. *Wishon*, 21 Mont. 458, 54 Pac. 566); and in a later case the supreme court of California reaches the same conclusion (*Pendleton* v. *Cline*, 85 Cal. 142, 24 Pac. 659). There is in fact not any question of variance presented in *McCord* v. *Seale*, but that is the question decided. In this case the plaintiffs properly brought this action in their individual names, alleged that they furnished the materials and did the work. The action is upon a *quantum meruit*, and in such case it is not necessary to allege that the cause of action accrued to

them as copartners. (*Clark* v. *Wick*, 25 Or. 446, 36 Pac. 165; *Boosalis* v. *Stevenson*, 62 Minn. 193, 64 N. W. 380.) Whether a contract was introduced in evidence upon the trial of this case the record does not disclose, but there was not a fatal variance between the pleading and the proof. (*Clark* v. *Wick*, above.) The evidence is ample to sustain the decision of the court in the first instance; and we do not find that any errors were committed upon the trial.

The order granting a new trial is reversed, and the cause is remanded to the district court, with directions to vacate the order made and enter an order denying a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

LYNCH, APPELLANT, v. GREAT NORTHERN RAILWAY CO. ET AL., RESPONDENTS.

38 511
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(No. 2,624.)

(Submitted March 1, 1909. Decided March 27, 1909.)

[100 Pac. 616.]

Personal Injuries—Death by Negligence—Railroads—Complaint—Insufficiency—Demurrer.

Personal Injuries—Death by Negligence—Complaint—Insufficiency.

1. Where, in an action against a mining company and a railroad company to recover damages for the negligent killing of a person while walking on or crossing the latter defendant's track, which action was based upon the alleged fault of the former in allowing steam from its plant to be so exhausted as to obscure the track, and upon the negligent failure of the employees of the latter to give warning of an approaching train, it was impossible to ascertain from the allegations of the complaint at what place the accident occurred, where the track was enveloped in steam, whether deceased was in the steam on the track when killed, or at a place where miners were in the habit of crossing the track in going to or coming from work, a demurrer to the pleading was properly sustained.

Same—Railroad Crossings—Duty to Give Signals.

2. If deceased was not on a public crossing when struck by defendant railroad company's train, but several hundred feet away from it, the

failure of its employees to give warning of the approaching train did not constitute a breach of any duty which the company owed him.

Same—Complaint—Insufficiency.

3. The allegation in the complaint that it was the duty of defendant railroad company to refrain from wantonly killing a human being on its track and, in order to observe said duty, to give warning of an approaching train, was insufficient to put the defendant in the wrong, in the absence of the further allegation that it had not observed the duty, or that deceased was in a place where its observance would have enabled him to escape injury.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by Matilda Mary Lynch, administratrix of the estate of Timothy P. Lynch, deceased, against the Great Northern Railway Company and the Boston and Montana Consolidated Copper and Silver Mining Company. From a judgment for defendants on demurrer to the complaint, plaintiff appeals. Affirmed.

Messrs. Breen & Hogevoll, for Appellant.

We have set out in the complaint that there was a crossing and by reason thereof there was a statutory duty to sound the whistle or ring the bell when a highway was crossed. A violation of positive law is willful negligence. Another part in the complaint showing willful negligence is the allegation that the caboose was put in front of the engine, thereby making it impossible for defendants to observe trespassers. Running a train backward without lights or signals amounts to willful negligence. (*Bolin* v. *Southern Ry. Co.,* 65 S. C. 222, 43 S. E. 665.) Placing a caboose in front of the engine is no less willful negligence. Contributory negligence is no defense if the railway company violates a statutory duty, as in the case at bar. (Thompson on Negligence, sec. 210.) If the company has reason to believe that trespassers are on its track, then it is under obligation to exercise ordinary care to discover their presence and avoid injuring them. (*St. Louis etc. Ry. Co.* v. *Shifflet* (Tex. Civ. App.), 56 S. W. 698.) Increased care is demanded of the company where the view is obstructed—in this case by the

caboose in front of the engine and by the exhaustion of the steam on the track. (Thompson on Negligence, sec. 1509.)

Messrs. Forbis & Evans, and *Messrs. Kremer, Sanders & Kremer,* for Respondent Boston & Montana Con. Copper & Silver Mining Company.

Mr. I. Parker Veazey, for Respondent, Great Northern Railway Company.

Citing: *Egan* v. *Montana Central Ry. Co.,* 24 Mont. 571, 63 Pac. 831; *Driscoll* v. *Clark,* 32 Mont. 192, 80 Pac. 1373; *Herbert* v. *Southern Pac. Co.,* 121 Cal. 227, 53 Pac. 651; *Denver City Tramway Co.* v. *Cobb,* 164 Fed. 43; *Kansas City etc. Ry. Co.* v. *Cook,* 66 Fed. 122, 13 C. C. A. 364, 28 L. R. A. 181; *Masser* v. *Chicago R. I. & P. Ry. Co.,* 68 Iowa, 602, 27 N. W. 776; *Nolan* v. *New York & N. H. R. Co.,* 53 Conn. 461, 4 Atl. 106; *Glass* v. *Memphis & C. R. Co.,* 94 Ala. 581, 10 South. 217; *Hulsey's Adm.* v. *Louisville Ry. Co.,* 27 Ky. Law Rep. 969, 87 S. W. 302; *Wencker* v. *Missouri K. & T. Ry. Co.,* 169 Mo. 592, 70 S. W. 145; *Louisville & N. R. Co.* v. *Hocker,* 111 Ky. 707, 64 S. W. 638, 65 S. W. 119.

MR. JUSTICE SMITH delivered the opinion of the court.

The complaint in this action, after alleging the corporate character of the Great Northern Railway Company and the Boston and Montana company, and the representative capacity of the plaintiff, reads as follows:

"(4) That the said defendants William Borden, Daniel Eaton, J. H. Kane, and Charles B. Foster now are, and have at all the times hereinafter set out been, citizens of the state of Montana, and have resided in the city of Butte in said state, and at the time of the injury hereinafter described were servants of the said railway company, and had charge of the engine and caboose that ran over the deceased as hereinafter set out.

"(5) That on or about the fifth day of February, A. D. 1908, the said defendants, acting jointly, and by their joint act of

wanton and willful negligence, did strike, maim, and kill Timothy P. Lynch, the husband of this plaintiff, as follows, to-wit: The said defendant Boston and Montana Consolidated Copper and Silver Mining Company has for a long time prior to the said date, and did on the said date, operate a mine known as the 'Gambetta Mine,' and from the said mine the said corporation willfully, wrongfully, and negligently exhausted steam on the track of the said railway corporation, through a certain pipe laid at said place by the said Boston and Montana Consolidated Copper and Silver Mining Company, and thereby did obscure the said track, and made it impossible for the other said defendants to see through the said steam, and thereby did cause the injury hereinabove set out, by making it impossible for any person walking on the said track to see through the said steam, and no person could tell if a locomotive or cars came along while the said steam was obstructing the view of said track, and the said track was thereby made extremely and extraordinarily dangerous for pedestrians on the said track, and extremely dangerous for all persons that used said track who were by virtue of necessity, and as licensees, using said track. That the said exhaustion of steam had continued for at least a year before the fifth day of February, 1908.

"(6) That at the said place, near the said Gambetta mine, a great many mines are operated, and approximately five hundred men, as a general rule, would, between the hours of 5 and 6 in the afternoon, at which time of the day the injury hereinafter described took place, use the said track as pedestrians for a distance of from two hundred to five hundred feet, or cross at a certain crossing about two hundred feet north of the point where the injury hereinafter described took place. That approximately for ten years previous to the said date the said number of men had, without objections from the said railway company, and by the said railway company's license, and as a matter of necessity in going and coming to and from their work to mines surrounding the said track, used the said track as a footpath, and had been in the habit of crossing the said track at the said place, and at different places, where the said injury took

place. That by virtue thereof the deceased, Timothy Lynch, was a licensee, and was rightfully on the track.

"(7) That the said railway company knew that their track was used in the manner as aforesaid, or by the exercise of ordinary care would have known that it was so used, and the said mining company well knew, or by the exercise of ordinary care ought to have known, that the said exhaustion of steam made the said track dangerous as aforesaid, under the condition as hereinabove set out, and the defendants William Borden, Daniel Eaton, H. J. Kane, and Charles B. Foster also well knowing the premises; but nevertheless the said defendant railway company, by its said servants, at some time between the hours of 5 and 6 in the afternoon on the fifth day of February, or thereabouts, in the year 1908, without blowing the whistle at the said crossing, and without looking ahead of the engine or caboose, and in great disregard of human life, attached a certain caboose in front of an engine, and ran from the north over the said crossing of a certain public highway, at the rate of twenty miles an hour, and by their gross negligence and wanton disregard of human life did kill Timothy P. Lynch, the husband of this plaintiff, while the said Timothy P. Lynch was acting with due care on his part, by running over the said Timothy P. Lynch by having their said caboose attached in front of the said engine, while the said engine was running at the rate of twenty miles an hour.

"(8) That the said railway company and its servants, well knowing the negligence of the said mining company by exhausting its steam, and well knowing it would be impossible for a person to get off of its track while in the said steam, did not ring the bell and did not blow the whistle a distance of from fifty to eighty rods from the said crossing.

"(9) That the said railway company and its servants, as it came to the said place where the said view was obstructed, expected that some human being would be run over by the said defendant railway company; and its servants, by reason of the fact as aforesaid, to-wit, that miners were always on the track at said time and at said place, in utter disregard of human life,

going at a dangerous rate of speed, then and there did run over the said deceased Timothy Lynch, and maimed and killed him as aforesaid.

"(10) That it was the duty of the said defendant railway company, and the duty of its said servants, to refrain from wantonly killing any human being on its track; and, in order to observe said duty, it would be necessary to ring the bell or blow the whistle, as hereinbefore set out, and also to blow its whistle or ring its bell in approaching said steam, and not to put a caboose in front of its engine, and thereby obstruct its own view, and not to go at an excessive rate of speed at a place where human beings were constantly known to be crossing or walking on the said track, and when human beings were expected to be. That it was the duty of the said mining company not to so construct and maintain its plant that dense volumes of steam would obstruct the view on the said track, and thereby prevent pedestrians, licensees, and employees and the said railway company and its servants from seeing each other and thereby prevent injury.

"(11) That the place where the said Timothy P. Lynch was killed was in the suburbs of the city of Butte, known as Meaderville, in the county of Silver Bow, state of Montana."

Both corporation defendants filed separately general demurrers to the complaint, which were sustained; and, the plaintiff refusing to plead over, judgment was entered against her, and she appeals therefrom.

On account of the peculiar phraseology of the pleading we have devoted much time to an examination and analysis of this complaint, and necessarily so because the contentions of the respective parties involve questions of law of so great importance to litigants and the legal profession that the court is not satisfied to apply any of them on a foundation of mere conjecture as to the meaning of the complaint. The contention of the appellant appears to be that she is entitled to rely on what has come to be known in the law as the doctrine of the "last clear chance," applied to a case where the defendant *should* have known of the deceased's peril. Another contention is that

a railroad company is bound to use reasonable care to prevent injury to persons who, for a long period of time, without objection from the company, have used the right of way as a convenient path or place of crossing, even though such persons are technically trespassers. Another contention seems to be that the company owed to deceased the duty to give the proper signals of warning before passing over a public highway crossing. The learned judge who sustained the demurrers said in his order that he did so on the authority of *Egan* v. *Montana Central Ry. Co.*, 24 Mont. 569, 63 Pac. 831. Appellant contends, in the brief of her counsel, that this case is distinguishable from the *Egan Case*, for the reason that her complaint alleges that the defendant knew her husband was in a place of peril, although he could not be seen. On the other hand, the respondent railway company claims that the case is squarely within the rule of the *Egan Case*, and should be affirmed on that authority, unless the court is prepared to overrule or modify that case.

The briefs are voluminous and exhaustive, and show great research of authority; and a decent respect for the counsel engaged, and their efforts to assist the court in arriving at a proper conclusion, bearing in mind also the importance of the case to the plaintiff, impels us to state our views with greater elaboration of detail than would otherwise appear to be necessary or desirable under the circumstances. It is first necessary to ascertain, if possible, from the complaint where Lynch was killed, because the location of that place is determinative of the question whether the defendants owed him any duty in the place where he was, and, if so, what duty. If we can determine where Lynch was located at the time he was struck and killed, we may then apply the proper rule of law to the conduct of the two defendants under the circumstances, and inform the plaintiff whether or not she may recover damages from one or both of them, provided, of course, that she is able to prove the allegations of her complaint. If we cannot decide where Lynch was located, it would be idle to attempt to apply any rule of law at all.

It is alleged, in paragraph 5 of the complaint, that the mining company, on February 5, 1908, operated the Gambetta mine, and from the said mine exhausted steam on the track of the railway company through a pipe laid at "said place." This allegation locates the place only to the extent that it was on the track of the railway. Paragraph 6 sets forth that, "at the said place, near the said Gambetta mine, a great many mines are operated, and approximately five hundred men, as a general rule, would, between the hours of 5 and 6 in the afternoon, at which time of the day the injury hereinafter described took place, use the said track as pedestrians for a distance of from two hundred to five hundred feet, *or* cross at a certain crossing about two hundred feet north of the point where the injury took place." We cannot determine from this allegation where the five hundred men were in the habit of crossing, whether at the road crossing, or at a point several hundred feet away, or whether some of them crossed at one place, and some at another, or whether they used first one place and then the other. Nor is the matter made any clearer by the subsequent allegation that the men "used the said track as a footpath, and had been in the habit of crossing the said track at the said place, *and at different places where the said injury took place.*" We cannot tell from this allegation where the injury took place, or where the track was enveloped in steam, or whether the men simply crossed the track at a certain place, or at several places, or walked along the track laterally. Nor is there any allegation that Lynch was one of the men who were accustomed to use the track, or that he was with the men who were so using the track. There is no allegation here, or in any other part of the complaint, so far as we can discover, that Lynch was in the steam, or on the track at some place other than the public crossing.

Paragraph 6 appears to be an attempt to lay a foundation for the conclusion that Lynch was a licensee, and, viewed in that light, those allegations relating to the highway crossing become immaterial, because, if Lynch was on the highway crossing, he was in a place where he had a right to be. In view of the allegation that the steam was so dense that Lynch could not be

seen in any event, the allegation that the caboose was ahead of the locomotive appears to be immaterial. Paragraph 7 alleges that the "defendant railway company, * * * without blowing the whistle at the said crossing, and without looking ahead of the engine or caboose, and in great disregard of human life, attached a certain caboose in front of an engine, and ran from the north over the said crossing of a certain public highway, at the rate of twenty miles an hour, and by their gross negligence and wanton disregard of human life did kill Timothy P. Lynch, while the said Lynch was acting with due care on his part, by running over the said Lynch, by having their said caboose attached in front of the said engine, while the engine was running at the rate of twenty miles an hour." Then follows paragraph 8, as follows: "That the said railway company and its servants, well knowing the negligence of the said mining company by exhausting its steam, and well knowing it would be impossible for a person to get off of its track while in the said steam, did not ring the bell and did not blow the whistle a distance of from fifty to eighty rods from the said crossing."

It will be observed that while the foregoing paragraphs do not expressly aver that Lynch was on the crossing, they do so by implication, and if the contention were made that the complaint states a cause of action for negligent killing at a public highway crossing, we should feel obliged to give it serious consideration. But no such contention is advanced, and it would be manifestly unjust to the plaintiff for this court to force upon her a cause of action to which she makes no claim, and which she could, probably, not prove. And the allegation that Lynch was a licensee seems to negative the idea that he was on the crossing. But our embarrassment is not thereby removed, because plaintiff's counsel contend in their brief that it was the duty of the railway company's servants to sound the whistle and ring the bell at the crossing. If Lynch was not on the crossing when struck, the neglect to give signals of warning at the crossing two hundred feet away was not a breach of any duty the company owed him in the place where he was. (*Toomey* v. *Southern Pacific Ry. Co.*, 86 Cal. 374, 24 Pac. 1074,

10 L. R. A. 139; *Morgan* v. *Wabash Ry. Co.*, 159 Mo. 262, 60 S. W. 195-200; *Elwood* v. *New York etc. R. R. Co.*, 4 Hun (N. Y.), 808; Thompson on Negligence, sec. 1707.) But, despite the position of counsel, it seems to us that the most definite allegations in the complaint, if we may be allowed the expression, have a greater tendency to locate Lynch at the crossing than elsewhere. But, again, this position seems untenable because of the allegation in paragraph 6 that the crossing therein referred to was two hundred feet north of the point where the injury took place. Paragraph 9 of the complaint speaks for itself, and we, therefore, refrain from comment upon it. Paragraph 10 is an allegation of duty on the part of the railway. One averment is that "it was the duty of the railway company to refrain from wantonly killing any human being on its track, and in order to observe said duty, it would be necessary * * * to blow its whistle or ring its bell in approaching said steam." There is no allegation that the company did not observe this duty, or that Lynch was in a place where an observance of the duty would have enabled him to avoid the injury.

We find no causal connection between any of the acts complained of and the result to Lynch, and are unable to determine what was the proximate cause of his death. Not only that, but if we may assume, which we may not, that Lynch was killed while in the steam, he appears to have voluntarily gone into a place of known danger, and the allegation that he acted with due care does not relieve the plaintiff, when she assumes to state all the surrounding facts and circumstances, from the necessity of also showing the exact place of the accident, to the end that the court may judge whether or not his negligence contributed to the result. On the face of the complaint the deceased appears to have been guilty of gross negligence, and whether or not such negligence on his part was a proximate cause of his death depends primarily upon the location of the place where he was at the time; and the accountability of the defendants also depends upon that, because, if they owed him any duty at

all, the nature of such duty would vary, dependent upon the place of the accident.

The judgment appealed from is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied April 24, 1909.

MIZE, ADMX., RESPONDENT, v. ROCKY MOUNTAIN BELL TELEPHONE CO. ET AL., APPELLANTS.

(No. 2,657.)

(Submitted March 13, 1909. Decided April 3, 1909.)

[100 Pac. 971.]

Electricity—Death by Negligence—Duty of Defendants—Proximate Cause—Elements of Damages—Verdict—Municipal Ordinances—Pleadings—Different Acts of Negligence—Proof.

Electricity—Death by Negligence—Duty of Defendant—Care Required.

1. Plaintiff's intestate was killed while working in a field, some ten miles from a city, by coming in contact with a fence wire which had been charged with a dangerous current of electricity by means of a high tension wire of an electric power company, which, in falling upon a telephone wire in the streets of the city, charged the latter, and it in turn transferred the current through a guy wire to the fence wire. Defendant telephone and electric power companies contended that they did not owe any duty to deceased. *Held*, that they were bound to use reasonable care to prevent the crossing of their respective wires and the consequent diversion of the dangerous current into means of transmission with which persons rightfully about their business might come in contact.

Negligence—Proximate Cause.

2. The "proximate cause" of an injury is that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which the injury would not have occurred.

Electricity—Personal Injuries—Proximate Cause.

3. To break the chain of sequence between defendants' negligence in permitting their wires to come in contact, and the death of plaintiff's intestate, so as to relieve them from its consequences, it was necessary for the accident to have been such a one as could not reasonably have been anticipated by them; and to hold them liable it was not necessary to show that they ought to have foreseen the particular injury which did result, but if it appeared that they ought to have anticipated that

some accident was likely to happen as the reasonable and natural consequence of their negligence, it was sufficient.

Same.

4. Defendant companies were chargeable with knowledge that an electric current will go wherever there is a metallic substance to conduct it, and therefore should have foreseen that serious injury might reasonably be expected to result to one coming in contact with a telephone wire charged with a highly dangerous current of electricity, or with one leading from it.

Same—Railroad Rights of Way—Trespassers.

5. Though a railroad company may not alienate its right of way or any part of it so as to interfere with the full performance of the functions of the railway, it may grant a license for the construction of an irrigating ditch over a portion of it; therefore deceased, who was killed, while cleaning out a ditch constructed under such a grant, through contact with a fence wire charged with electricity as detailed in paragraph 1 above, was not a trespasser to whom defendants owed no duty.

Same—Measure and Elements of Damages—Instructions.

6. Under section 6486, Revised Codes, providing that "such damages may be given as under all the circumstances of the case may be just," evidence relative to the marital relations existing between plaintiff and her intestate up to the time of his death was permissible; and the court did not err in charging the jury that in estimating the damages plaintiff was entitled to, they might take into consideration, as an element of such damages, the pecuniary loss of the widow on account of being deprived of the comfort, protection, society and companionship of her husband.

Same—Pleadings—Causes of Action—Form of Verdict.

7. Where the complaint in an action to recover damages for the negligent killing of a person stated but a single cause of action, though drawn in four separate counts specifying separately the acts of negligence relied upon, a verdict finding the issues in favor of plaintiff "on each and all of the four causes of action set forth in the complaint" was in effect a general verdict and sufficient; while the pleading was defective and the verdict unusual in form, defendants' rights could not have been prejudicially affected by either.

Same—Municipal Ordinances—Scope.

8. A municipal ordinance which, though a grant of a franchise to defendant telephone company, provided generally that, whenever it was necessary for any electric light or power wire to approach or cross telephone or telegraph wires, the same should not approach or cross such wires at a distance of less than four feet, was applicable alike to defendant electric power company, and its violation was *prima facie* negligence.

Same—Different Acts of Negligence—Proof.

9. Plaintiff was not required to prove every act of negligence charged in her complaint; having proved to the satisfaction of the jury facts sufficient to show that the negligence of defendants directly caused the death of her intestate, she was entitled to recover.

Appeal from District Court, Gallatin County; Henry L. Myers, Judge, presiding.

ACTION by Georgie Mize, as administratrix of John Mize, deceased, against the Rocky Mountain Bell Telephone Company

and the Gallatin Light, Power and Railway Company. From a judgment for plaintiff and from an order denying them a new trial, defendants appeal. Affirmed.

Messrs. H. G. & S. H. McIntire, for Appellant, Rocky Mountain Bell Telephone Company.

The Rocky Mountain Bell Telephone Company was not in the control of, nor was it managing or supervising, the wire in question here; there was therefore no duty in and about the same owing by it to respondent's intestate. An action for injury to person or property arising from negligence can be maintained only where it is made to appear that some duty existed, on the part of the person causing the injury, towards the person injured, which duty was left unfulfilled. (Thompson on Negligence, Supp., sec. 3, and cases cited in note 9; *Newark Elec. L. & P. Co.* v. *Garden,* 78 Fed. 75, 23 C. C. A. 649, 37 L. R. A. 725; *Driscoll* v. *Clark,* 32 Mont. 188, 80 Pac. 1, 373; *Shaw* v. *New Year Gold Mines Co.,* 31 Mont. 146, 77 Pac. 515; *Nord* v. *Boston & M. C. C. & B. M. Co.,* 30 Mont. 59, 75 Pac. 681.) That appellant did not owe any duty to deceased, see *Fowles* v. *Briggs,* 116 Mich. 428, 72 Am. St. Rep. 537, 74 N. W. 1046, 40 L. R. A. 530; *Griffin* v. *Jackson L. & P. Co.,* 128 Mich. 655, 92 Am. St. Rep. 496, 87 N. W. 888, 55 L. R. A. 320; *Missouri K. & T. R. Co.* v. *Merrill,* 65 Kan. 443, 93 Am. St. Rep. 287, 70 Pac. 358; *Cumberland T. & T. Co.* v. *Martin,* 116 Ky. 554, 105 Am. St. Rep. 229, 76 S. W. 394, 77 S. W. 718, 63 L. R. A. 469.

In an action for injuries caused by negligence, it must be shown by the plaintiff that the alleged negligence was the proximate cause of the injury. If the facts are disputed, then it is for the jury to determine, but if not, then the court cannot shift its duty upon the jury to declare the result of such facts. (*McGehee* v. *Norfolk & S. Ry. Co.,* 147 N. C. 142, 60 S. E. 917; *Cole* v. *German S. & L. Soc.,* 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 423; *Snyder* v. *Colorado Springs etc. R. Co.,* 36 Colo. 288, 118 Am. St. Rep. 110, 85 Pac. 686, 8 L. R. A., n. s., 781; *Missouri Pac. Ry. Co.* v. *Columbia,* 65 Kan. 390, 69 Pac.

338, 58 L. R. A. 399; *Stephenson* v. *Corder*, 71 Kan. 475, 114 Am. St. Rep. 500, 80 Pac. 938, 69 L. R. A. 246.) "One is answerable in damages for the consequences of his faults only so far as they are natural and proximate, may therefore have been foreseen by ordinary forecast, and not for those arising from a conjunction of his own faults with circumstances of an extraordinary nature." (*Allegheny* v. *Zimmerman*, 95 Pa. 295, 40 Am. Rep. 649.) That this principle is applicable to the case at bar is apparent from the decision in *Consolidated E. L. & P. Co.* v. *Koepp*, 64 Kan. 735, 68 Pac. 608, a case very similar to the present one. See, also, the following cases where this subject is elaborately considered: *Claypool* v. *Wigmore*, 34 Ind. App. 35, 71 N. E. 509; *Ahern* v. *Oregon Tel. & T. Co.*, 24 Or. 276, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 635; *Hoag* v. *Lake Shore etc. R. Co.*, 85 Pa. 293, 27 Am. Rep. 653; *Snyder* v. *Colorado etc. Co.*, 36 Colo. 288, 118 Am. St. Rep. 110, 8 L. R. A., n. s., 781, 783; *Kreigh* v. *Westinghouse etc. Co.*, 152 Fed. 120, 11 L. R. A., n. s., 686; *State* v. *Boston etc. R. Co.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794; *Harton* v. *Forest City Tel. Co.*, 146 N. C. 429, 59 S. E. 1022, 14 L. R. A., n. s., 956.

The existence of the guy wire, its defective installation, so that it came in contact not only with the private telephone wire, but with the barbed-wire fence, could not and should not have been foreseen or expected by defendants in the usual, natural or probable course of events. Indeed, the contrary should have been anticipated by them, upon the principle that it is to be presumed that a duty owing by one to another will be and is performed. (*Cole* v. *German S. & L. Soc., Consolidated E. L. & P. Co.* v. *Koepp, supra.*) The guy wire was an independent and efficient event or agency intervening between any possible cause, set in motion by either of the defendants, and the injury. It was *causa causans*, the *sine qua non*, and, under the authorities, it must be held to have been the proximate cause of the injury complained of, and under the pleadings and testimony it was the duty of the lower court to so declare. (See *Cole* v. *German S. & L. Soc., supra.*)

Deceased was a trespasser on the right of way of the Northern Pacific Railway Company. A trespasser, or licensee, must take the risks of the premises as he finds them. The only duty owing to such a person is to refrain from wantonly or willfully injuring him. This rule further applies to premises not belonging to the defendant, but adjacent or contiguous thereto. (*Graves* v. *Washington Power Co.*, 44 Wash. 675, 87 Pac. 956, 11 L. R. A., n. s., 452; *Cumberland T. & T. Co.* v. *Martin, supra; Herzog* v. *Hemphill*, 7 Cal. App. 116, 93 Pac. 899; *Egan* v. *M. C. Ry. Co.*, 24 Mont. 574, 63 Pac. 831; *Northern Pacific R. Co.* v. *Townsend*, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044.)

The measure of damages in a case of this character is the amount which the deceased would probably have earned during his life, taking into consideration his age, ability and disposition to work, and his habits of living, and expenditures. (*Soyer* v. *Great Falls Water Co.*, 15 Mont. 5, 37 Pac. 838; *Pennsylvania Tel. Co.* v. *Varnau* (Pa.), 15 Atl. 624; *Schaub* v. *Hannibal etc. R. R. Co.*, 106 Mo. 74, 16 S. W. 924; *Castello* v. *Landwehr*, 28 Wis. 522.) And in *Bourke* v. *Butte E. & P. Co.*, 33 Mont. 267, 289, 83 Pac. 470, and *Olsen* v. *Montana Ore Pur. Co.*, 35 Mont. 400, 89 Pac. 734, is emphasized the rule that damages must be confined to probable earnings, etc., of the deceased. (See, also, *Colusa Parrot etc. Co.* v. *Monahan*, 162 Fed. 276-282.) In permitting the plaintiff to testify over defendants' objection, as to the relations of affection, faithfulness and kindness which had existed between her and her deceased husband, the court committed error.

Mr. J. L. Templeman, and *Messrs. Hartman & Hartman*, for Appellant, Gallatin Light, Power & Railway Company.

Messrs. Walrath & Patten, for Respondent.

The duty which devolved upon the Bell company, by reason of its assumption of control of the private wire, was the duty which devolves upon any corporation or person who, as owner, contractor, or mere volunteer or meddler, assumes the management or control of something which, if not properly managed

or controlled, is likely to cause injury to others to exercise care, and it became responsible to any person who might be injured through its negligent failure to discharge that duty. (*Van Winkle* v. *American Steam Boiler Ins. Co.*, 52 N. J. L. 240. 19 Atl. 472; *Pittsfield Cottonwear Mfg. Co.* v. *Pittsfield Shoe Co.*, 71 N. H. 522, 53 Atl. 807, 60 L. R. A. 116; *Styles* v. *F. R. Long & Co.*, 70 N. J. L. 301, 57 Atl. 448; *Nagel* v. *Missouri R. R. Co.*, 75 Mo. 653, 42 Am. Rep. 418; *Fuchs* v. *City of St. Louis*, 133 Mo. 168, 31 S. W. 115, 34 S. W. 508, 34 L. R. A. 118; *Boston & Me. R. R. Co.* v. *Sargent*, 72 N. H. 455, 57 Atl. 688.) The concurrent duty of both appellants is established by a long line of cases, arising under similar circumstances. (*McKay* v. *Southern Bell Tel. etc. Co.*, 111 Ala. 337, 56 Am. St. Rep. 59, 19 South. 695, 31 L. R. A. 589; 15 Cyc. 474; *Hebert* v. *Lake Charles etc. Co.*, 111 La. 522, 100 Am. St. Rep. 505, 35 South. 731, 64 L. R. A. 101; *Drown* v. *New England Tel. etc. Co.*, 80 Vt. 1, 66 Atl. 801; *City Electric etc. Co.* v. *Conery*, 61 Ark. 381, 54 Am. St. Rep. 262, 33 S. W. 426, 31 L. R. A. 570; *United Electric etc. Co.* v. *Shelton*, 89 Tenn. 423, 24 Am. St. Rep. 614. 14 S. W. 863; *Guinn* v. *Delaware etc. Co.*, 72 N. J. L. 276. 111 Am. St. Rep. 668, 62 Atl. 412, 3 L. R. A., n. s., 988; *East Tennessee etc. Co.* v. *Carmine*, 29 Ky. Law Rep. 479, 93 S. W. 903; *Cumberland etc. Co.* v. *Ware's Admx.*, 24 Ky. Law Rep. 2519, 74 S. W. 289; *Simmons* v. *Shreveport Elec. Co.*, 116 La. 1033, 41 South. 248; *Citizens' Tel. Co.* v. *Thomas* (Tex. Civ. App.), 99 S. W. 879; *Harrison* v. *Kansas City etc. Co.*, 195 Mo. 606, 93 S. W. 951, 7 L. R. A., n. s., 293.)

If one sets in motion a cause, which any reasonable person must foresee is likely to result in injury to others, and an injury does in fact result, which, after its occurrence, and in the light of what actually occurred, appears to have been a natural and probable consequence of such cause, it is sufficient. It is by no means necessary that the wrongdoer have the precise knowledge of conditions to know, or the power of imagination to forecast, every possible consequence which will flow from his act of negligence, because, if this were so, ignorance and stupidity would be a cloak of immunity. If there be an unbroken chain of

sequence from the original negligence to the injury, it will remain the proximate cause, regardless of the number of successive instruments through or upon which it may have operated. (*Milwaukee etc. R. Co.* v. *Kellogg,* 94 U. S. 469, 24 L. Ed. 256; *Fishburn* v. *Burlington etc. Co.,* 127 Iowa, 483, 103 N. W. 481; *Slattery* v. *Lawrence Ice Co.,* 190 Mass. 79, 76 N. E. 459; *Davis* v. *Mercer Lumber Co.,* 164 Ind. 413, 73 N. E. 899; *Watters* v. *City of Waterloo,* 126 Iowa, 199, 101 N. W. 871; *Drum* v. *Miller,* 135 N. C. 204, 102 Am. St. Rep. 528, 47 S. E. 421, 65 L. R. A. 890; *White Sewing Machine Co.* v. *Richter,* 2 Ind. App. 331, 28 N. E. 446.) Other interesting applications of this principle to cases where the facts were unusual will be found in the following cases: *Burk* v. *Creamery Package Mfg. Co.,* 126 Iowa, 730, 106 Am. St. Rep. 377, 102 N. W. 793; *Atchison T. & S. F. Ry. Co.* v. *Parry,* 67 Kan. 515, 73 Pac. 105; *Meyer* v. *Milwaukee Elec. Ry. & L. Co.,* 116 Wis. 336, 93 N. W. 6; *City of Henderson* v. *O'Haloran,* 114 Ky. 186, 102 Am. St. Rep. 279, 70 S. W. 662, 59 L. R. A. 718; *City of Dixon* v. *Scott,* 181 Ill. 116, 54 N. E. 897; *Glanz* v. *Chicago etc. Ry. Co.,* 119 Iowa, 611, 93 N. W. 575; *Galveston etc. Ry. Co.* v. *Currie* (Tex. Civ. App.), 91 S. W. 1100; *Indianapolis etc. Ry. Co.* v. *Barnes,* 35 Ind. App. 485, 74 N. E. 583.

The following cases present facts analogous to those in the case at bar, and illustrate our contention that it was the negligence of the appellants in permitting the crossing of the wires in Bozeman, and not the existence of the guy wire, that was the proximate and efficient cause of the death of Mize; and that the existence of the guy wire was a mere condition through and upon which the negligence of the appellants operated, in unbroken sequence, in causing the injury: *Nelson* v. *Narragansett Electric Lighting Co.,* 26 R. I. 258, 106 Am. St. Rep. 711, 58 Atl. 802, 67 L. R. A. 116; *McKenna* v. *Citizens' Natural Gas Co.,* 198 Pa. 31, 47 Atl. 990; *Snyder* v. *Philadelphia Co.,* 54 W. Va. 149, 102 Am. St. Rep. 941, 46 S. E. 366, 63 L. R. A. 896; *Harton* v. *Forest City Telegraph Co.,* 141 N. C. 455, 54 S. E. 299; *Burk* v. *Creamery Package Mfg. Co.,* 126 Iowa, 730, 106 Am. St. Rep. 377, 102 N. W. 793; *Turner* v. *Page,* 186 Mass.

600, 72 N. E. 329; *Leeds* v. *New York Tel. Co.,* 178 N. Y. 118, 70 N. E. 219.

It is by no means necessary that the proximate cause be the one nearest to the event, or that it be the sole cause. (*Shippers' Compress & Warehouse Co.* v. *Davidson,* 35 Tex. Civ. App. 558, 80 S. W. 1032; *Galveston etc. Ry. Co.* v. *Vollrath,* 40 Tex. Civ. App. 46, 89 S. W. 279; see, also, *Bowden* v. *Derby,* 99 Me. 208, 58 Atl. 993; *Strange* v. *Bodcaw Lumber Co.,* 79 Ark. 490, 116 Am. St. Rep. 92, 96 S. W. 152; *Gulf etc. Ry. Co.* v. *Josey* (Tex. Civ. App.), 95 S. W. 688; *Neal* v. *Rendall,* 100 Me. 574, 62 Atl. 706; *Houston etc. Ry. Co.* v. *Oram* (Tex. Civ. App.), 92 S. W. 1031; *Yess* v. *Chicago Brass Co.,* 124 Wis. 406, 102 N. W. 932.)

The duty to insulate electric wires to prevent injury to those who may come in contact with them is well settled, and it is evident that the reason of the rule would extend it to the prevention of contacts with other wires which might in turn cause injury. (15 Cyc. 473; *Hebert* v. *Lake Charles Ice Co.,* 111 La. 522, 100 Am. St. Rep. 505, 35 South. 731, 64 L. R. A. 101; *Cumberland T. & T. Co.* v. *Ware's Admx.,* 115 Ky. 581, 74 S. W. 289; 1 Joyce on Electricity, sec. 517a; *Younie* v. *Blackfoot L. & W. Co.,* 15 Idaho, 56, 96 Pac. 193.) The fact that the insulation of dangerous electric wires is very expensive is no excuse for failure to keep such insulation perfect. (*McLaughlin* v. *Louisville etc. Co.,* 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812; *Hebert* v. *Lake Charles etc. Co., supra.*)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On May 20, 1907, and for some time prior thereto, the defendants Rocky Mountain Bell Telephone Company, hereinafter referred to as the "Bell company," maintained a telephone exchange in Bozeman, and owned and maintained pole lines in various streets and alleys and had wires suspended from such poles, as a part of its telephone system. At all such times the Gallatin Light, Power and Railway Company, hereinafter referred to as the "Light Company," owned and operated an electric light and

power plant, and, as a part of its plant, it owned and maintained certain pole lines in the streets and alleys of Bozeman and the wires attached to such poles. At all such times the Bozeman Milling Company and the Benepe-Stanton Grain Company, hereinafter referred to as the "private companies," owned and operated a private telephone line from Bozeman to Belgrade, a distance of eleven or twelve miles. On May 20, 1907, John Mize was killed at a point near the private telephone line and nine or ten miles from Bozeman. His wife, as administratrix of his estate, brought this action against the Bell company and the light company to recover damages. It is alleged in the complaint that for a period of about two years prior to and including May 20, 1907, the Bell company had assumed and exercised full charge, supervision, and control of the private telephone wire from Third Avenue North, to Tracy Avenue North, a distance equal to three city blocks, in the city of Bozeman. It appears from the complaint that the portion of the private telephone line just mentioned was strung upon poles belonging to the Bell company, which poles were set along an alley cutting both Third Avenue and Tracy Avenue at right angles. It appears also that the light company had wires strung to poles along Grand Avenue North—an avenue running parallel with and between Third and Tracy Avenues and cut by the alley at right angles also. On May 20, 1907, the private telephone wire, which crossed above the light wires at right angles, became detached from the Bell company's poles, near the intersection of the alley and Grand Avenue, fell upon a wire belonging to the light company, and received a charge of about two thousand volts of electricity from the light wire. About nine or ten miles from Bozeman, the private telephone line, following the course of the public road, turned from north to west. For the purpose of securing the corner pole, a guy wire was attached to the pole near the top and between the two private wires, and then attached to a fence post on the outer line of the right of way of the Northern Pacific Railway Company. It appears that the guy wire touched one of the private telephone wires and also came in contact with one strand of fence wire.

This fence ran south a short distance where it connected with another wire fence, called the "inner right of way fence," and at a point on this inner right of way fence, about three-fourths of a mile from the point of intersection of the two fences, John Mize was at work in an irrigating ditch belonging to his employer, Young, on the late afternoon of May 20, 1907, when, coming in contact with a wire on the fence, he was killed. It is alleged that the current of electricity received by the private telephone line wire from the light wire was conducted along the telephone wire to the guy wire, thence over the guy wire to the outer right of way fence wire, thence over that wire to the wire of the inner right of way fence, and along the wire of the inner right of way fence to the point where Mize was at work, and that when he came in contact with this wire he received the charge of electricity and was killed thereby. It is charged that the defendants were negligent in the following particulars: 1 (a) The Bell company in permitting this private telephone wire to become detached from its poles. (b) The light company in permitting the insulation on its wires to become defective. (2) In failing to provide a guard or device at the point where the wires crossed, to prevent the wires from coming in contact. (3) In violating a city ordinance of the city of Bozeman. (4) In failing to break the contact between the two wires for a period of six hours or more. From a judgment rendered and entered in favor of the plaintiff, and from an order denying them a new trial, the defendants have appealed.

A review of the authorities cited would not serve any useful purpose. There is not any substantial conflict in the authorities upon the general rules of law applicable in negligence cases. and we might select cases from the briefs of appellants or respondent in support of the principles which we announce, with one or two possible exceptions. The difficulty which the courts generally experience is, not in ascertaining the rules of law, but in applying them to the facts of particular cases.

1. *Legal duty:* It is urged by counsel for appellants that they did not owe any legal duty to Mize. This contention is aptly

answered in *City Electric St. Ry. Co.* v. *Conery*, 61 Ark. 381, 54 Am. St. Rep. 262, 33 S. W. 426, 31 L. R. A. 570, a case in many respects similar to the one before us. The street railway company maintained a power line through certain streets in Little Rock. White owned a private telephone line running at right angles to one of the railway company's lines. The private telephone wire came in contact with the power line and received a supercharge of electricity. Conery came in contact with the private telephone wire and was injured. He recovered against the street railway company and White, the owner of the private telephone wire. On appeal by the street railway company the question now before us was raised. The court said: "The next question is: Upon what duty of the appellant to the appellee can this action be based? The answer to it is: Upon the duty enjoined by the rule which requires everyone to so use his property as not to injure another. The applicability of this rule may be shown by many illustrations. One is where an owner of a vicious animal accustomed to do hurt, knowing his habits, negligently allows him to escape. He is responsible for the mischief the animal does, because it was the duty of the owner to keep him secure. * * * This rule applies with equal force to electric companies. They are bound to use reasonable care in the construction and maintenance of their poles, cross-arms, and wires, and other apparatus, along streets and other highways. They are required to do so for the protection of persons and property." (21 Am. & Eng. Ency. of Law, 2d ed., 476.)

2. *Proximate cause:* One of the principal contentions made in this case is that, assuming the negligence of the defendants, such negligence was not the proximate cause of Mize's death, for the reason that the guy wire intervened and broke the causal connection between the negligence of the defendants and the death of Mize. The *proximate cause* of an injury is that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which the injury would not have occurred. (*Goodlander M. Co.* v. *Standard Oil Co.*, 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A.

583; 1 Shearman & Redfield on Negligence, sec. 26; 6 Current Law, 757; *Missouri Pac. Ry. Co.* v. *Columbia,* 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399; *Claypool* v. *Wigmore,* 34 Ind. App. 35, 71 N. E. 509.)

What intervening cause will break the chain of sequence and so far insulate the first wrongdoer's negligence from the injury as to relieve such wrongdoer? The courts have experienced some difficulty in answering this inquiry, and they are not altogether in harmony upon the subject; but to this extent they may be said to agree: That to relieve the original wrongdoer the result must be such that he could not reasonably have anticipated it. In 29 Cyc. 499, the rule is stated as follows: "The mere circumstance that there have intervened between the wrongful cause and the injurious consequence acts produced by the volition of animals or persons does not necessarily make the result so remote that no action can be maintained. The test is not to be found in the number of intervening events or agencies, but in their character and in the natural connection between the wrong done and the injurious consequence, and if such result is attributable to the original negligence as a result which might reasonably have been foreseen as probable, the liability continues." What ought to be foreseen or anticipated as the probable consequence of the wrongdoer's negligence? In the first instance, it is not necessary to show that he ought to have anticipated the particular injury which did result; but it is sufficient to show that he ought to have anticipated that some injury was likely to result as the reasonable and natural consequence of his negligence. This is the meaning of section 6068, Revised Codes, and expresses the rule announced by this court in *Reino* v. *Montana M. L. Dev. Co., ante,* p. 291, 99 Pac. 853.

The evidence is conclusive upon one point: That with the current of electricity necessary to operate this private telephone line, and telephone lines generally, the wires are entirely harmless. The evidence also shows that telephone wires are frequently exposed where persons—even children—may come in contact with them. The defendants are chargeable with knowl-

edge of these facts, and therefore chargeable with knowledge that this private telephone line itself was, or wires leading from it were, likely to be so placed that persons might rightfully come in contact with one or more of them. In our view of this case, the manner in which the guy wire was attached is not of any consequence. If, as shown by the evidence, the current of electricity necessary to operate this private telephone line was harmless, then the owners of the private line might have attached their wires directly to the fence posts of the inner right of way fence (if they had permission to do so). We say this to emphasize our view that these defendants were chargeable with the consequence which might reasonably be expected to follow the charging of this private wire with a dangerous current of electricity, in view of the fact that telephone wires are likely to be exposed where persons, rightfully about their business, may come in contact with them. It will not do for defendants to say that they could only expect that this dangerous current would be carried over the private line, eighteen or twenty feet above the ground, to Belgrade. They were chargeable with knowledge that the current would go wherever there was a metallic substance to conduct it; and while it is not necessary in this case to adopt the broad rule announced by Shearman & Redfield on Negligence, section 29, to the effect "that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed (whether they could have been ascertained by reasonable diligence or not) would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind," we do go to the extent of saying that these defendants ought reasonably to have anticipated that, by their negligence in permitting this private wire to become charged with a dangerous current of electricity, serious injury would result to some one if in fact the private wire, or a wire leading from it, was exposed as it might be exposed.

3. *Was Mize a trespasser?* The evidence shows that Mize met death while at work in an irrigating ditch. The portion of the

ditch in which he was at work at the time of his death is over and upon a portion of the right of way of the Northern Pacific Railway Company. Concerning this ditch, Young, the employer of Mize, testified: "I remember the occasion of his death. He was working for me at that time. * * * My irrigating ditch is on the south side of the road and on the north side of the road also. Crossing the road it runs through a flume, and this ditch is made out of rocks, and he was cleaning this ditch when he came in contact with this fence. John Mize's work would call him to the place where he was killed. * * * I found him lying under the fence dead. That was the right of way fence. He was lying with his body toward the flume, but he was as well as over the fence before that, kind of on his back in the irrigating ditch. * * * It is my ditch, and heads not in a slough, but in a regular running stream there near the railroad track." This evidence was not contradicted in any way and is sufficient to make out a *prima facie* case that Mize was not a trespasser; but counsel for appellants insist that the railway company cannot alienate any portion of its right of way, and therefore Mize must be presumed to have been a trespasser, and *Northern Pacific Ry. Co.* v. *Townsend*, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044, is cited. But that case is only authority for the propcsition that title to a portion of such right of way cannot be acquired by adverse possession. It may be conceded that the Northern Pacific Railway Company cannot alienate its right of way, or any part of it, so as to interfere with the full performance of the functions of the railway; but that an additional servitude may be imposed upon a portion of such right of way, or that the railway company may grant a license for such use of its right of way as will not interfere with the proper operation of its railway system, we entertain no doubt.

4. *Measure of damages:* Over the objection of defendants, the court permitted evidence to be introduced tending to show the marital relations of plaintiff and her husband up to the time of Mize's death, and in instruction 34 the court advised the jury that, if they found for the plaintiff, then, in estimating

the damages, they might take into consideration the pecuniary loss, if any, of the widow on account of her being deprived of the comfort, protection, society and companionship of her husband. In each of these instances we think the trial court was correct. Section 6486, Revised Codes, provides that "such damages may be given as under all the circumstances of the case may be just." The authorities are not harmonious upon this question, but in California, where they have a statute similar to our section 6486 above, the rule announced has been in force for many years. (*Beeson* v. *Green Mt. G. Min. Co.*, 57 Cal. 20; *Cook* v. *Clay St. H. R. Co.*, 60 Cal. 604; *Cleary* v. *City R. Co.*, 76 Cal. 240, 18 Pac. 269; *Munro* v. *Pacific C. etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; *Morgan* v. *Southern Pac. Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 30 Pac. 603, 17 L. R. A. 71; *Lange* v. *Schoettler*, 115 Cal. 388, 47 Pac. 139; *Harrison* v. *Sutter St. Ry. Co.*, 116 Cal. 156, 47 Pac. 1023; *Wales* v. *Pacific Elec. M. Co.*, 130 Cal. 521, 62 Pac. 932, 1120; *Green* v. *Southern Pac. Ry. Co.*, 122 Cal. 563, 55 Pac. 577; *Green* v. *Southern Cal. Ry. Co.* (Cal.), 67 Pac. 4; *Dyas* v. *Southern Pac. Co.*, 140 Cal. 296, 73 Pac. 975; *Evarts* v. *Santa Barbara C. R. Co.*, 3 Cal. App. 712, 86 Pac. 830.) While not directly deciding the question, this court, in *Hollingsworth* v. *Davis-Daly Estates Copper Co., ante*, p. 143, 99 Pac. 142, intimated that the rule we have announced would be followed.

5. *Form of verdict:* The verdict in this case reads as follows: "We, the jury in the above-entitled cause, find the issues herein in favor of the plaintiff, Georgie Mize, and against the defendants, Rocky Mountain Bell Telephone Company and Gallatin Light, Power and Railway Company, on each and all of the four causes of action set forth in the complaint herein, and fix and assess her damages at the sum of six thousand dollars ($6,000.00)." The complaint is drawn in four separate counts or causes of action, but in fact it states but a single cause of action and specifies separately the acts of negligence. While under our Code practice there may arise cases in which it is proper to set forth a single cause of action in separate counts, this is clearly not such a case. The verdict, too, is unusual in

form; but these defects, we think, are not such as could have prejudicially affected the rights of either defendant. The verdict is in effect a general verdict and is sufficient. (5 Ency. of Pl. & Pr. 339; *Lancaster* v. *Connecticut Mut. L. Ins. Co.*, 92 Mo. 460, 1 Am. St. Rep. 739, 5 S. W. 23.)

6. *Instructions:* Exceptions were taken by the appellants to the action of the trial court in giving certain instructions and in refusing to give instructions asked by defendants; but, after a careful review of the instructions given and refused, we are unable to find any error prejudicially affecting the rights of either appellant. The charge, as a whole, seems to us to present the law of the case fairly.

7. *The evidence:* Without rehearsing the evidence, it is sufficient to say that in our opinion it is ample to sustain the verdict. It tends to show such supervision and control of the private wire by the Bell company, at the point where the two wires came in contact, as renders that company liable for its negligence in permitting the wire to become detached and to fall upon the light wire. It is also sufficient to show the negligence of the light company in failing to keep its wire properly insulated. It is sufficient to go to the jury upon the question of the negligence of both defendants in failing to break the contact between the wires for many hours after they came in contact and before Mize's death.

There was a palpable violation of the city ordinance, and neither of these defendants can escape liability by saying that the ordinance applies only to the other. While the ordinance is a grant of a franchise to the Bell company, it is more than that. Section 5 provides: "Whenever it is necessary for any electric light or power wire to approach or cross the line of any fire alarm, police telegraph, telegraph or telephone wires, the same shall not approach to or cross either of said wires at a distance of less than four feet either above or below said fire alarm police telegraph, telegraph or telephone wire." This provision is a general municipal law applicable to both of these defendants (*Hayes* v. *Michigan Cent. Ry. Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410; *Heidt* v. *Southern Telephone Co.*, 122

Ga. 474, 50 S. E. 361; *Clements* v. *Louisiana Electric Light Co.*, 44 La. Ann. 692, 32 Am. St. Rep. 348, 11 South. 51, 16 L. R. A. 43), and its violation was *prima facie* negligence (*Commonwealth Electric Co.* v. *Rose*, 214 Ill. 545, 73 N. E. 780; 1 Thompson on Negligence, sec. 1196; 1 Shearman & Redfield on Negligence, sec. 13).

It is clear from this evidence that neither of these defendants took any precaution to prevent the wires, where they crossed, from coming in contact, other than to fasten the wires to poles. In 1 Joyce on Electricity, section 490a, the author says: "Where electric wires are maintained by different companies in the streets, obligations are by law imposed upon each, not only with respect to the others, but also to individuals and to the public in general to prevent a contact of the wires, which may result in injury to property or person. The question as to the duty of such companies arises most frequently where an injury has resulted from the contact of a telegraph or telephone wire with an electric light or trolley wire by which the dangerous current of the latter is conveyed into the former. From a consideration of the several cases in which the liability of a company under such circumstances is considered, the rule may be deduced that, where companies of such a character occupy the streets with their poles and wires, each company is under the obligation to exercise reasonable or due care—that is, a degree of care which is reasonable in view of the circumstances and commensurate to the dangers and risks involved—to prevent its wires from coming into contact with the wires of another company, and that a company which has been negligent in the performance of its duty in this respect will, in the absence of contributory negligence on the part of the persons injured, be liable for the injury resulting from such contact."

The evidence was amply sufficient to show negligence on the part of the Bell company in failing to use well-known simple devices to prevent the private wire from coming in contact with the high tension wire of the light company. The evidence upon this point, so far as it relates to the light company, is very slight; but, after all, it was a question for the jury, under all

the circumstances of the case, to say whether the light company had used reasonable care to prevent the contact of the two wires. In discussing this subject in a case arising from an injury received from crossed wires, the supreme court of Wisconsin, in *Block* v. *Milwaukee St. Ry. Co.*, 89 Wis. 371, 46 Am. St. Rep. 849, 61 N. W. 1101, 27 L. R. A. 365, said: "The negligence which is alleged and claimed against the defendant is its omission to place guard wires over its trolley wires in such a way as to prevent the telephone wires, in case of their falling from any cause, from falling upon and coming in contact with the trolley wires. * * * No doubt it is the duty of the defendant to use such customary and approved appliances as are known and used in the business of operating electric railways. So far as reasonable knowledge, in the present state of the science and the practical use of electricity as a motive power for street railways, and reasonable foresight, can go, it is bound to guard the public against the perils attendant upon this use of electricity; but it is liable only for what is known as reasonable care. The present state of the science, and the present practical knowledge of the most practical and effectual means and methods of guarding against such perils as are incident to its use, are a most important element in the question of what is reasonable care. In the present condition of the science and of the practical knowledge on this subject, it cannot be said, as matter of law, what method of guarding the wires shall be required, nor whether any guards shall be required, for it is not known to the law that any method now known will prove effective; but it is a question for the jury, under all the facts in the cause, to determine whether the method actually used was negligent."

The case of *Hamilton* v. *Bordentown Electric Light Co. et al.*, 68 N. J. L. 85, 52 Atl. 290, presents facts very similar to those in the case before us. For brevity the companies are referred to as the "light company," the "telegraph companies," and the "telephone company." It appears that the low tension wire of the telegraph companies crossed above the high tension wire

of the light company, and some distance away crossed under the low tension wire of the telephone company. The telegraph wire was permitted to come in contact with the wire of the light company and received a supercharge of electricity. The telephone wire came in contact with the telegraph wire and likewise received a dangerous current. Plaintiff's intestate, attempting to remove the telephone wire, was killed. The light company and the telegraph companies were held liable, and, speaking of their duty, the court said: "It is assumed that the defendants were each maintaining wires in the public highways in the exercise of a franchise. Hence each was bound to take reasonable care not to injure other users of the street. It was the duty of the electric light company to use reasonable care that other uninsulated telegraph wires that crossed it should not be allowed to come in contact with its wire, which was insulated, and which carried a powerful electric current, and remain for so long a time in contact therewith as to wear away the insulation and divert the powerful current to the telegraph wire, to the probable injury of persons who should come in contact with the telegraph wire, or in contact with other wires which might be brought in touch with the charged telegraph wire. It was the duty of the three companies maintaining the telegraph wire to use reasonable care to prevent their wire from coming in contact with the highly charged electric light wire and remain in contact therewith in such a way and for so long a time as to wear off the insulation and divert the current to its own wire, to the danger of those who should touch it or touch another wire with which it might come in contact. (*New York etc. Telephone Co.* v. *Bennett*, 62 N. J. L. 742, 42 Atl. 759.)" (See, also, *Western Union Tel. Co.* v. *State*, 82 Md. 293, 51 Am. St. Rep. 464, 33 Atl. 763, 31 L. R. A. 572.) But in the view we take of this complaint, it was not necessary for plaintiff to prove every act of negligence charged. She did prove to the satisfaction of the jury facts sufficient to show that the negligence of these defendants directly produced the death of Mize.

The case was fairly submitted, and the correct result appears to have been reached. The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

IN RE GROGAN'S ESTATE. GROGAN ET AL., APPELLANTS, *v.* BURKET, ADMINISTRATOR, ET AL., RESPONDENTS.

(No. 2,638.)

(Submitted March 16, 1909. Decided April 3, 1909.)

[100 Pac. 1044.]

Executors and Administrators—Estates of Deceased Persons—Conveyances — Petition — Sufficiency — Tender—Findings—Conclusiveness.

Executors and Administrators—Estates of Deceased Persons—Conveyances—Petition—Sufficiency.

1. A petition, filed pursuant to the provisions of section 7614, Revised Codes, for an order requiring an administrator to convey real property as per a contract entered into between decedent and petitioner, which set forth the contract at length and alleged an adequate consideration for it, was sufficient; it was not necessary that it contain all the essential averments of a bill in equity for the specific performance of a contract.

Same—Petition—Tender—When Unnecessary.

2. Petitioner having paid into the county treasury, for the use of the administrator, the last installment due on the contract above referred to, it was not necessary for him to make an actual tender of the balance still owing. The law does not require the doing of an idle thing.

Same—Petition not Premature.

3. Prior to the time the last installment on the above contract became due, litigation involving the lands arose and a suit was commenced by others in the United States circuit court. Thereupon decedent and petitioner entered into a supplemental agreement that final payment should not be made until said action was finally determined *in said court*. The contention that the petition to convey was premature, inasmuch as an appeal may have been taken from the decree of the circuit court, *held* without merit, since the determination "in said court" meant in the circuit court, and not on appeal.

Findings—Conclusiveness.

4. Where the evidence does not preponderate against the trial court's findings, they will not be disturbed on appeal.

Appeal from District Court, Gallatin County; Frank Henry, Judge.

IN THE MATTER of the estate of Jesse H. Grogan, deceased. From an order allowing R. V. Spain's petition for an order directing W. B. Burket, administrator, to execute a deed to the former, Darius F. Grogan and another appeal. Affirmed.

Mr. J. L. Staats, and *Mr. M. J. Cavanaugh,* for Appellants.

Messrs. Hartman & Hartman, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On July 15, 1904, Jesse H. Grogan executed and delivered to R. V. Spain an instrument in writing, by the terms of which he sold to Spain four hundred acres of land, situated in Gallatin county, for $20,000, payable as follows: $7,000 cash, $3,000 on July 15, 1905, and $10,000 on July 15, 1906, with interest on deferred payments at six per cent per annum, payable annually. Prior to the time the last payment became due D. F. and Jones P. Grogan (these appellants) commenced a suit in the United States circuit court for the district of Montana, seeking to compel Jesse H. Grogan to convey the same land to them. On account of the pendency of this suit Jesse H. Grogan and Spain deemed it unwise to complete their transaction, and a supplemental agreement was entered into, by the terms of which it was agreed that the final payment should not be made by Spain "until said suit is finally determined in said court." Thereafter, and before the payment was in fact made, Jesse H. Grogan died, and in January, 1908, Spain presented to the district court of Gallatin county his verified petition, asking that the administrator of Jesse H. Grogan's estate in Gallatin county be directed to execute to him a deed for the property, upon his paying the final installment and interest. To this petition D. F. and Jones P. Grogan filed a written protest, as-

serting, as the grounds of their objections: (1) That at the time of making the contract of 1904 and the supplemental agreement Jesse H. Grogan was insane; and (2) that the consideration for the agreement is inadequate. Upon the trial there was not any evidence offered in support of the first objection. Evidence was offered upon the second ground of objection, but the court found that issue in favor of the petitioner, and directed the administrator to make proper conveyance. From this order the protestants appealed.

This proceeding was taken pursuant to section 7614, Revised Codes, which provides: "When a person who is bound by contract in writing to convey any real estate dies before making the conveyance, and in all cases when such decedent if living, might be compelled to make such conveyance, the court or judge may make an order authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto." It is now earnestly contended by counsel for appellants that the petition must contain all the essential averments of a bill in equity for the specific performance of a contract, and reference is made to section 6103, Revised Codes, and it is contended that the allegations of the petition must avoid every negative statement contained in that section. This contention is not maintainable. In *Finlen* v. *Heinze*, 28 Mont. 548, 73 Pac. 123, this court had under consideration this same question, and. speaking of section 4417, Civil Code of 1895 (now section 6103, above), we said: "The evident meaning of this section is that any one of these subdivisions furnishes a defense to an action for specific performance. In other words, when specific performance is sought against a party, he may interpose any one of the defenses named above; and, if he can maintain it, he defeats the action. The burden of proof as to such defense is upon him who asserts it." In other words, if the petition shows a contract fair upon its face, and one the specific performance of which may be decreed, it is sufficient. Of course, if the contract falls within any of the classes mentioned in section 6102, it cannot be specifically enforced.

The petition in this instance sets forth the contract at length. It is a plain, simple contract for the conveyance of real estate. The petition alleges that the consideration for the contract is $20,000, and this is sufficient. In 20 Encyclopedia of Pleading and Practice, page 445, the rule is stated as follows: "It is necessary to allege and show to the court an adequate consideration for the performance of the contract. Where the contract is set out in the bill, and recites that it is executed for a valuable consideration, this is a sufficient allegation of such consideration."

The petition does not definitely tender the final installment with interest, but it does allege a readiness and willingness to make the payment, and only asks that the deed be ordered upon the petitioner's paying the amount with the interest due. The law does not require anyone to do an idle thing, and it would have been an idle ceremony for Spain to have tendered the final payment to the administrator, for the administrator could not have given a deed without an order of court. The very fact that Spain was dealing with an administrator is of itself sufficient to excuse an actual tender, when, as in this instance, it appears from the evidence that prior to the trial the money had been paid into the county treasury, for the use of the administrator. This, we think, was sufficient. It is true, as a general rule, that the party seeking performance must show performance of all the terms of the contract by him to be performed. In this instance the only acts to be performed by Spain consisted of his making the payments. He shows that he has already made the first and second payments, and was ready to make the final payment, so that in fact the petition does sufficiently show compliance on his part.

It is suggested that the application for a deed was prematurely made, in that an appeal may have been taken from the decree of the circuit court. In our opinion this supplemental agreement was intended merely for the benefit of Spain—not for the benefit of Jesse H. Grogan. Its purpose was to relieve Spain from making final payment while the property was involved in litigation; but, if Spain had seen fit to make such

payment and demand a deed, he would certainly have been entitled to it. But apparently this supplemental agreement does not contemplate a delay pending appeal, for it refers to the suit in the circuit court, and then provides: "Now it is hereby agreed that the final payment of $10,000 mentioned in said bond shall not be paid until said suit is finally determined *in said court.*" In either view we think demand for the deed was not premature.

The evidence touching the adequacy of the consideration is conflicting; that is to say, it consists of the opinions of different witnesses whose opinions differ, but we are not in a position to say that the evidence preponderates against the trial court's findings.

The order is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SMITH concur.

TRURO ET AL., APPELLANTS, *v.* PASSMORE ET AL., RESPONDENTS.

(No. 2,632.)

(Submitted March 13, 1909. Decided April 3, 1909.)

[100 Pac. 966.]

Pleadings — Common-law Counts — Inapplicable Under Code Practice.

1. Plaintiff, under a common-law count for money had and received, sought to show fraud on the part of defendants. The court held the testimony inadmissible, for the reason that the facts relied upon to show fraud were not set forth in the complaint. *Held*, that, since under section 6532, Revised Codes, the complaint must contain a statement of the facts constituting the cause of action, in ordinary and concise language, and the common law has no application where the law is declared by the code (section 8060), the ruling of the court was correct.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by Leo Truro and another against Charles Passmore and another. Judgment for defendants. Plaintiffs appeal from it and an order denying them a new trial. Affirmed.

Messrs. Denny & Davies, for Appellants.

Under the common count for money had and received, both at common law and under the Codes, fraud may be proven to recover money paid under a written contract. (*Moses* v. *Macferlan,* 2 Burr. 1005; *Smith* v. *Lamb,* 26 Ill. 397, 79 Am. Dec. 381; *Johnson* v. *Continental Ins. Co. of N. Y. City,* 39 Mich. 33; *Bliss* v. *Thompson,* 4 Mass. 488; *Jasper Trust Co.* v. *Kansas City etc. Co.,* 99 Ala. 416, 42 Am. St. Rep. 75, 14 South. 546; *Southern Express Co.* v. *Bank of Tupelo,* 108 Ala. 517, 18 South. 664; *Sullivan* v. *Traders' Ins. Co. of Chicago,* 169 N. Y. 213, 62 N. E. 146; *Wagner* v. *Wedell,* 3 Cal. App. 274, 85 Pac. 126; *Reilly* v. *Provost,* 98 App. Div. 208, 90 N. Y. Supp. 591; *Smith* v. *Salomon,* 7 Daly, 216; *Cory* v. *Board etc.,* 47 N. J. L. 181; *Grannis* v. *Hooker,* 29 Wis. 65; *McQueen* v. *State Bank of Indiana,* 2 Ind. 413; *Lyon* v. *Annable,* 4 Conn. 350; *Lewis* v. *Kremer,* 3 Md. 265.)

Messrs. McBride & McBride, and *Mr. C. M. Parr,* for Respondents.

MR. JUSTICE SMITH delivered the opinion of the court.

The complaint in this action alleges that on the twenty-fourth day of April, 1907, the defendants received the sum of $3,000 from the plaintiffs "to and for the use of the plaintiffs," which sum, after demand, the defendants have refused to repay. The answer is a general denial. At the trial the plaintiffs introduced in evidence a written contract between the parties, which recites that on the twenty-fourth day of April, 1907, defendants agreed to sell to plaintiffs a one-third interest in a certain option agreement with third persons, which on the day before, April 23, had been extended to December 1, 1907, and also a one-third interest in the Susie quartz lode mining claim, for a

consideration of $2,000 in cash, and an additional $1,000, which was to be applied, by the Passmores, on the purchase price of the mining claims covered by the option. Plaintiffs proved the payment of the $3,000 to the defendants under the terms of the contract, and also offered evidence tending to prove that the option had expired when their contract was made, and that the renewal thereof was procured by the Passmores after the $3,000 had been paid, by paying $1,000 thereof to the owners of the property covered by the option, in consideration of which payment the option was extended to December 1, and the purchase price reduced from $14,000 to $13,000. The written agreement also provides as follows: "Now it is understood and agreed by the parties hereto that they will proceed as soon as practical to organize a stock company for the purchase of the mining property referred to in this agreement, and to use their best efforts to put a sufficient amount of the capital stock of such company on the market to raise sufficient capital out of the proceeds of the sale of said stock to pay for said property, to meet the expenses of the sale of stock and to pay the expenses of putting said property to patent," and to repay the Truros the $1,000, "which they shall have paid on said purchase price," etc. Plaintiffs offered to show that the whole contract was void, as having been conceived and entered into in fraud, by the defendants, without any intention of carrying out its terms, and with the sole object of inducing the plaintiffs to part with their money. The court held the testimony to be inadmissible under the pleadings, for the reason that the facts relied upon to show fraud were not set forth in the complaint. No corporation was ever formed, and the option agreement expired on December 1 by lapse of time, without having been taken up by the parties to this action. Mrs. Truro testified that she had never been tendered a deed for the one-third interest in the Susie claim; but one of the defendants testified that a deed to this interest was executed on September 2, 1907, and tendered to Mrs. Truro in November following. Defendants moved for a peremptory instruction to the jury to find in their favor, for the reason, among others (we state our understanding of the

motion), that the plaintiffs cannot recover in this action as for money had and received. The court granted the motion, and from a judgment on the verdict rendered pursuant to the court's instruction, and an order denying a new trial, the plaintiffs have appealed. Numerous assignments of error are found in appellants' brief, but the decisive question involved is one of pleading. If the ruling of the court was correct, it must be sustained regardless of the reason assigned therefor.

The first condition is that the court erred in excluding evidence of fraud on the part of the defendants. This assignment raises the main question in the case. Many cases are cited to the effect that fraud may be shown under a count for money had and received, without further allegations. The great majority of the cases are from common-law jurisdictions, and would, perhaps, be in point if that system of pleading obtained in this state. Some of the cases cited, however, seem to be squarely applicable to this case. The supreme court of Wisconsin, in *Grannis* v. *Hooker*, 29 Wis. 65, held that a complaint containing what, under the former system of pleading, would be called a count for money had and received stated a good cause of action under the Code system of pleading, and that in support of such complaint the plaintiff was entitled to introduce evidence that the defendant procured the money sued for by means of fraud in an oil land transaction. It was there said: "It is claimed by the defendant that all the facts with reference to the alleged fraud should have been distinctly stated in the complaint, otherwise the plaintiff is not entitled to prove them. On the other hand, it is claimed that all it is necessary the complaint should contain is substantially an allegation that the defendant has received a certain amount of money to the use of the plaintiff, as in the old form of a declaration in *indebitatus assumpsit*. We are inclined to sanction this latter view, and to hold that the facts which, in the judgment of the law, create the indebtedness or liability need not be set forth in the complaint."

Another case cited by appellants is *Cory* v. *Board etc.*, 47 N. J. L. 181. In that case it appeared that the defendant, a

member of the board of chosen freeholders, made out bills to himself against the county, ostensibly for money paid by him for work on bridges, not showing when, or by whom, or on what bridges, or under whose authority the work had been done. These bills were certified by the defendant as one of the committee of the freeholders, and were paid. The court said: "The first question raised by the assignment of errors in this cause is whether money fraudulently obtained by the defendant below from the plaintiff can be recovered on the common count for money had and received, which does not set out the particulars of the fraud. This may be answered by extracts from the opinion of the king's bench, delivered by Lord Mansfield in *Moses* v. *Macferlan*, 2 Burr. 1005: 'If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action [on the case, for money had and received to the plaintiff's use], founded in the equity of the plaintiff's case, as it were, upon a contract. * * * One great benefit which arises to suitors from the nature of this action is that the plaintiff need not state the special circumstances from which he concludes "that *ex æquo et bono*, the money received by the defendant ought to be deemed as belonging to him." He may declare generally "that the money was received to his use," and make out his case at the trial. * * * This kind of equitable action, to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged. * * * It lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition (express or implied), or extortion, or oppression, or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. * * * In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged, by the ties of natural justice and equity, to refund the money.' The plaintiff's declaration is properly framed to sustain its claim."

The New Jersey case is authority for the contention that proof of fraud may be introduced to sustain an action for

money had and received, under the common-law system of pleading, but it goes no further than that. The Wisconsin case is, however, authority for the additional proposition that a common-law count for money had and received is a good pleading, as such, in a Code state; for at the time the decision was rendered, the statute of Wisconsin, directing what a complaint must contain, was substantially the same as our section 6532, Revised Codes. But we cannot coincide in the views of the Wisconsin court. A complaint, fashioned after a common-law count, may or may not state facts sufficient to constitute a cause of action under the Code. It would be unprofitable to examine all of the common-law counts, and determine which, if any of them, would or might be sustained as a sufficient statement of facts to constitute a cause of action under our system, and we do not therefore decide that any of them may be sustained; neither do we at this moment think of any which, in our judgment, could be sustained. Suffice it to say that there is in this state no action for money had and received, as such; and there is no common law in any case where the law is declared by the Code. (Revised Codes, sec. 8060.) The common counts have been susperseded by our system of Code pleading. A complaint, under this latter system, must contain a statement of the facts constituting the cause of action in ordinary and concise language. (Revised Codes, sec. 6532, *supra.*) If the phraseology of any common count is adequate in the particular case to bring the pleader within the Code rule, then his pleading is sufficient; otherwise it is not. Where a pleader elects to employ the language of a common count, he subjects himself to the rules governing the construction and sufficiency of complaints under the Codes; that is to say, if a common count will in fact state his cause of action in ordinary and concise language, it is good. If it will not, it is bad. We think the Wisconsin court was in error when it decided that the facts which, in the judgment of the law, create the indebtedness or liability need not be set forth in the complaint. Our opinion is that those are the very facts which must be set forth.

Let us now consider the California cases on the subject. In *Freeborn* v. *Glazer,* 10 Cal. 337, it was held that a count, "in the ordinary form of counts in *indebitatus assumpsit* for goods sold and delivered and money paid and expended," contained a sufficient statement of facts to constitute a cause of action. This ruling was followed in *De Witt* v. *Porter,* 13 Cal. 172, and *Wilkins* v. *Stidger,* 22 Cal. 232, 83 Am. Dec. 64. In the case of *Abadie* v. *Carrillo,* 32 Cal. 172, the previous rulings of the court were adhered to, but Mr. Justice Sanderson, with the concurrence of Mr. Justice Rhodes, said: "If the question presented by the record in this case was new, I should be inclined to hold the complaint bad, upon the ground that it does not state facts sufficient to constitute a cause of action. Notwithstanding the many decisions to the contrary, I have never been able to regard the common counts as consistent with our Code of Practice, which was intended to provide a uniform mode of pleading in all cases. The fundamental rule in our system of pleading requires a statement of the facts constituting the cause of action or defense in ordinary and concise language, so that the precise matters intended may appear upon the face of the pleading, and the opposite party need not be put upon his outside knowledge for the purpose of ascertaining what is meant. I do not think the common counts satisfy this rule, and must regard their retention as impairing the symmetry of our system; but a contrary view was adopted at the outset, and has been uniformly adhered to since." The former decisions of the court were also followed in *Minor* v. *Baldridge,* 123 Cal. 187, 55 Pac. 783, and *Wagner* v. *Wedell,* 3 Cal. App. 274, 85 Pac. 126. In the *Minor Case* Mr. Justice Temple, writing the opinion of the court, said: "The mode of pleading is inconsistent with our Code, and it may be a matter of regret that it was ever tolerated."

Mr. Phillips, in his work on Code Pleading (section 182), says: "Facts stated to show the capacity of the parties, when such qualifying facts are called for, and jurisdictional facts, when these are necessary, constitute no part of the cause of action. In addition to, and independently of, such facts, the

complaint must contain a statement of facts constituting a cause of action. The provision of the Codes as to this part of the complaint is that it shall contain 'a statement of the facts constituting a cause of action, in ordinary and concise language.' This limits the statement (1) to facts; and (2) to such facts as constitute the right of the plaintiff and the delict of the defendant. It excludes (1) facts that are only probative; (2) statements of the law; and (3) inferences and arguments. A right of action * * * is a remedial right, arising out of a primary right in the plaintiff, a corresponding duty of the defendant, and a breach of this duty. This primary right and duty, and the defendant's violation thereof, are to be displayed in the complaint; and this is to be done by stating (1) such constitutive facts as, under the substantive law, operate to create such right and duty; and (2) such culpatory facts as show an invasion of the right and a breach of the duty. Such statement shows a right of action in the plaintiff, against the defendant, and authorizes the interposition of the court; and hence constitutes, and is, a cause of action."

In our judgment the Code provision (section 6532, Revised Codes, *supra*) was designed to eliminate from pleadings those features which excited the admiration of Lord Mansfield, as expressed in the *Moses Case,* and to substitute therefor a new system, to comply with the express mandate of which the plaintiff must state the facts upon which he relies for a recovery in such a way as that the defendant may know exactly what he has to meet. We have no hesitancy in saying that the complaint in this case does not state facts sufficient to constitute the cause of action claimed and sought to be proven by the plaintiffs at the trial. If there are any Montana cases militating against the views herein expressed, they have not been called to our attention, and an examination of Buck's, Bishop's, and Mape's Digests has not discovered them. At any rate, as the question is one of practice, it should be correctly settled. We do not mean to say that the plaintiffs have no cause of action against

the defendants, but only that the cause of action which they claim to have is not set forth in their complaint.

The judgment and order are therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

NICHOLS ET AL., RESPONDENTS, v. WILLIAMS, APPELLANT.

(No. 2,636.)

(Submitted March 15, 1909. Decided April 5, 1909.)

[100 Pac. 969.]

Mines—Adverse Suits—Findings—Review—Discovery Shaft—Location of—Evidence—Admission and Exclusion—Briefs—Pleadings—Amendment—Discretion.

Mines—Adverse Suits—Findings—Conclusive When.

1. Findings of the trial court, in an adverse suit to a mining claim, supported by a substantial preponderance of the testimony, will not be disturbed on appeal.

Same—Discovery Shaft—Location of, Within Claim.

2. The fact that the discovery shaft of a quartz lode mining claim, sunk ten feet deep as required by statute, was partly within the boundaries of an adjoining patented claim, was immaterial, where it appeared that its opening was within the boundaries of the former, and that the portion of the shaft within the confines of the claim was of such dimensions that a miner could work in it, and was in reality a shaft sunk upon the locator's own ground.

Evidence—Admission or Rejection—Briefs.

3. Where none of the evidence, to the admission or rejection of which exception had been taken, was quoted in the brief of appellant, either in substance or otherwise, the assignment of error in this regard will not be considered on appeal. (Rule X, sec. 3, subd. *b*.)

Mines—Adverse Suits—Pleadings—Amendments—Discretion.

4. Plaintiffs' location was made in 1905, that of defendant in 1906. At the trial of an adverse suit, in 1908, defendant asked leave to file a supplemental answer, alleging that plaintiffs had neglected to do the representation work on the claim in controversy, for the year 1907. The court refused permission to file it. *Held*, that it not appearing that defendant claimed to have initiated any rights subsequent to 1906, and his brief on appeal not disclosing any argument as to the materiality of the evidence sought to be introduced under the supplemental answer, there was no abuse of discretion in the court's action.

Appeal from District Court, Silver Bow County; Geo. M. Bourquin, Judge.

ACTION by E. A. Nichols and others against Holly D. Williams. From a judgment for plaintiffs and from an order denying him a new trial, defendant appeals. Affirmed.

Mr. John J. McHatton, for Appellant.

Messrs. Forbis & Evans, and *Mr. John E. Corette,* for Respondents.

MR. JUSTICE SMITH delivered the opinion of the court.

This is a suit to substantiate an adverse claim, filed in the land office of the United States at Helena, by the plaintiffs, against an application for a patent theretofore filed in said office by the defendant. Plaintiffs claim the Bessie Brooks lode, located July 30, 1905, and defendant applied for a patent to the Lucky Bill lode claim, located in 1906. These lode claims are in conflict. The Lucky Bill claim as located is practically within the boundaries of the Bessie Brooks location. The cause was tried in the district court of Silver Bow county. The judge personally inspected the disputed ground. The court's findings of fact and conclusions of law are as follows: "That all of the allegations of the complaint are true, save that plaintiffs' original discovery shaft was and is only partially upon public domain included within their claim; they are owners and entitled to the possession of that portion only of the land within the exterior boundaries of their claim which is in conflict with the claim made by the defendant, and defendant did all acts necessary to make a valid lode location upon said ground, if said ground had been public domain not subject to plaintiffs' claim at the time said acts were done; that all the allegations of the answer are true, save the allegation that defendant went upon public unoccupied mineral land and made a discovery, the allegation that defendant did all and every act necessary to make a valid location, which is untrue, in that he made his dis-

covery on land subject to and appropriated by plaintiffs' prior location, and the allegation that plaintiffs' claim is without right. And therefrom the court concludes that plaintiffs are entitled to recover herein against defendant, are the owners and entitled to possession of the ground in controversy here, and are entitled to decree as prayed for." The ground really in dispute is a triangular strip between patented claims, and is about forty-seven and five-tenths feet wide on the west end, running about six hundred and thirty-five feet easterly to a point. It is bounded by the following patented claims, viz., on the north by the Four Johns, on the west by the Protection, and on the south by the Gustavus. Plaintiffs had judgment in accordance with the court's conclusion of law, and from such judgment and an order overruling a motion for a new trial the defendant has appealed.

One of the allegations of the complaint is: "That within sixty days thereafter [after discovery] said E. A. Nichols, W. F. Fitzgerald, and Charles F. Jones [the original locators] did sink a discovery shaft upon said lode claim to the depth of at least ten feet from the lowest rim of such shaft at the surface, which shaft was four feet by six feet by ten feet in depth, and which shaft cut said lode at a depth of at least ten feet below the surface, and there showed and exposed a well-defined crevice of quartz, containing valuable deposits." The court found this allegation to be true, with the exception that the discovery shaft was only partially upon public domain. The testimony shows that the shaft was vertical, and was partly within and partly without the boundaries of the Bessie Brooks claim. Defendant claims in his brief that the evidence is insufficient to justify the decision of the court, but his specific grievance—the one which he argues—is that the finding that the plaintiffs' shaft was sunk to a depth of ten feet, and the vein was shown at that depth within the boundaries of the claim, is not sustained by the evidence. We have searched the record for the evidence on these points, and find it is conflicting as to both. We are of opinion that there is a substantial preponderance of testimony on both points in favor of the plaintiffs, and, therefore, have

no inclination to disturb the findings of the court below. (*Bordeaux* v. *Bordeaux*, 32 Mont. 159, 80 Pac. 6.)

But it is contended that the testimony shows that the original discovery shaft of the Bessie Brooks was partly in ground belonging to the Gustavus patented claim on the south. This is true, but it was also shown that the shaft was large enough so that a miner could work in that portion included within the Bessie Brooks location. This was sufficient. The fact that the shaft was partly within the boundaries of the Gustavus is of no consequence, provided that portion which was within the boundaries of the Bessie Brooks was of such dimensions as that it was in reality a shaft sunk upon that ground. This court, in *Butte etc. Min. Co.* v. *Barker*, 35 Mont. 327, 89 Pac. 302, said: "It is by means of the discovery shaft or the crosscut that the locator manifests his intention. If he chooses to make such manifestation by means of a discovery shaft, he must do the work on the claim. The shaft must be sunk on the claim, for so the statute declares; and this is done in order that anyone interested may see the evidence of his good faith. And for the like reason, if he makes manifest his intention by means of a crosscut, it must be from an opening upon the claim; otherwise, the owner of the claim upon which such opening is situated may rightfully refuse admission to such crosscut to any and every one except only the locator; and, if the locator has only a license to use such opening, he may at any time deny admission to the locator himself. It cannot be that the requirements of the law are met by doing work over which the locator himself has no control, as a matter of right, and from which he may be excluded at any time by an entire stranger. In the present case, so far as the claim initiated by Barker is concerned, there were not any indications upon the surface of that claim that he had done anything beyond posting a notice of location and marking the boundaries of the claim, and it does not aid him to say that his declaratory statement describes the crosscut as starting from a shaft, the location of which may be gained from the courses and distances given. Any inspection of such crosscut involved a trespass upon a patented claim, the property of a

third person." The appellant cites the *Barker Case, supra,* in support of his contention that the discovery shaft must be sunk entirely within the limits of the ground subject to location. All that was decided in that case, upon this point, was that the development work must be done upon the claim. But in this case the work was done upon the claim. The law does not attempt to prescribe the extent of any dimension of the shaft, save the depth. There must be a shaft upon the claim, and it must be sunk ten feet deep. The locators of the Bessie Brooks claim complied with this direction. Anyone interested could see the evidence of this development work within the boundaries of the claim; the opening of the shaft was upon the claim; the locator, and anyone else who was interested in the matter, could go to the bottom of the shaft without getting upon or into the Gustavus ground and inspect the lead, or work there if necessary, without permission from any third person. (See *Upton* v. *Larkin,* 7 Mont. 449, 17 Pac. 728.)

Some exception is taken to the action of the court in admitting and rejecting evidence, but none of the evidence, admitted or rejected, is quoted in the brief, either in substance or otherwise.

It is also contended that the court erred in admitting in evidence the declaratory statement and amended declaratory statement of the Bessie Brooks location, but no argument is made in support of the contention, and we are unable from a cursory examination of the documents to determine what, if any, specific objections thereto might have been well taken.

It appears from one of the bills of exception found in the record that the defendant, during the course of the trial, in February, 1908, asked leave to file a supplemental answer alleging that the plaintiffs had neglected to do the representation work on the Bessie Brooks lode claim in the year 1907. The court refused to allow the supplemental answer to be filed, saying that it considered the matter immaterial, and the ruling is assigned as error. As hereinbefore stated, the Bessie Brooks location was made in 1905 and the Lucky Bill was located in 1906. The defendant claimed to have initiated no rights subse-

quent to 1906. No argument is found in the brief, either as to the materiality of the evidence sought to be introduced under the supplemental answer, or disclosing any abuse of discretion on the part of the court, and we therefore hold that there was no abuse of discretion.

The judgment and order of the district court of Silver Bow county are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE, RESPONDENT, v. HANLON, APPELLANT.

(No. 2,626.)

(Submitted March 12, 1909. Decided April 5, 1909.)

[100 Pac. 1035.]

Criminal Law—Homicide—Self-defense—Evidence—Admissibility — Offer of Proof — Cross-examination — Conspiracy — Threats—Instructions—Presumption of Innocence.

Offer of Proof—Exclusion—When Proper.

1. In a prosecution for homicide, an offer of proof, some matters contained in which were competent and others incompetent because hearsay, was properly excluded as a whole.

Homicide—Evidence—Admissibility.

2. Defendant and deceased were members of two opposing factions in a mining town. The defendant knew that the latter had made threats against his life. An attempt had been made to kill him the night before the homicide. Among other acts of violence by the deceased was the "shooting up" and demolishing of a saloon, owned by defendant's employer, also a member of the faction to which accused belonged. Of this occurrence, which happened the night before the killing, defendant had no personal knowledge, but had been informed thereof by others, and also by deceased during an interview sought by him and which culminated in the affray. Counsel for defendant thereupon offered to prove by a witness who was present at the incident in the saloon that deceased had given him and others money for the purpose of raising a disturbance there, that they and deceased went there for that purpose, that the latter fired numerous shots and assaulted the barkeeper, knocking him senseless. This offer was excluded. *Held*, that the evi-

dence was admissible as tending to furnish a basis for a conclusion by the jury, in view of the threats theretofore made by deceased, that defendant, with knowledge of deceased's conduct at the saloon, had just ground for apprehension that his life was in danger or that he might suffer great bodily harm at the hands of deceased, and therefore acted in self-defense.

Same.

3. The offered evidence referred to in the above paragraph was further admissible as showing one of a series of acts of violence leading up to the killing, and indicating a continuous aggressive and dangerous disposition in deceased, as well as shedding light upon the motives of deceased in seeking the interview with defendant which ended in the killing, and at which, according to defendant's testimony, deceased referred to the incident in the saloon and impliedly threatened him with violence of the same character if he persisted in opposing the faction to which he, deceased, belonged.

Same.

4. The defendant having testified that deceased, in his interview with him, alluded to the occurrence in the saloon on the night previous, the excluded evidence was also admissible as tending to corroborate that statement.

Same—Specific Act of Violence—Discretion.

5. In the admission of evidence of the character of that included in the offer of proof referred to in paragraph 2 above, the court should be guided by a wise discretion; but in all cases where the specific act sought to be called to the attention of the jury, by reason of its proximity in time and place, would legitimately reflect upon the conduct or motives of the parties at the time of the affray, and especially when it bears some relation to the homicide, it should be admitted; and the fact that collateral issues may thus be presented cannot be held conclusive against the value of the evidence.

Same—Cross-examination.

6. A witness for the state had testified on direct examination that defendant had made threats against deceased a short time prior to the homicide. The witness was shown to have been financially interested in a mining company, the adherents of which composed the faction to which deceased belonged. On cross-examination he was asked if he had not stated in the presence of certain persons named that deceased, when he struck defendant over the head with a club immediately before the killing, had done just what he and the managing director of the company had told him to do. He was not permitted to answer. *Held*, to have been proper cross-examination. The witness' evidence in chief was material and damaging to defendant, and an affirmative answer would have shown that he was an interested witness, while a negative one would have opened the way to contradiction.

Same—Evidence—Insufficient Knowledge.

7. Where a witness' answer showed a want of sufficient knowledge to enable him to testify on the subject about which he was interrogated, his statement was properly stricken out.

Same—Evidence—Admissibility.

8. A witness for defendant testified that when deceased fell he saw a pistol fall as if coming from his hand, that he picked it up and kept it until the day of the trial. On cross-examination he stated that he had told the sheriff a few days after the shooting that he had not seen any pistol fall from the body of the deceased. On redirect examination he was asked to give his reasons for making such statement to the sheriff, but was denied permission to answer. The ruling *held* to have

been error. In view of the material importance of the evidence, and for the purpose of removing the suspicion that his testimony on direct examination was a fabrication, he should have been permitted to give his reasons for making the apparently inconsistent statement to the sheriff.

Same.

9. Evidence that a few weeks before the homicide witness met deceased, who was armed, and stated to witness that he was going to a certain mining claim, and that if accused was there he was going to put him off, was admissible as showing a spirit of antagonism in deceased toward accused, as well as a disposition to take the law into his own hands.

Same—Evidence—Conspiracy.

10. Evidence of an agreement or general understanding between the members of one faction to drive out of a community, by means of force and violence if need be, all persons belonging to another, was competent in a prosecution for homicide charged against a member of the latter class,—who pleaded self-defense,—as reflecting upon the attitude of the defendant's mind, and that of the deceased, at the time of the killing.

Same—Threats Against a Class—Evidence.

11. A hostile threat against a class of persons is a manifestation of a hostile state of mind against each person of that class.

Same.

12. Words and acts of one class of persons banded together for an unlawful purpose, importing hostility to another class, are imputable to all who belong to it, and, upon an issue of self-defense on a charge of murder alleged to have been committed by a member of the latter class upon one of the former while the deceased was apparently in pursuit of the common hostile purpose, should be received in evidence in favor of defendant, subject to the limitation that a wise discretion be exercised by the court in its admission, reviewable only in case of manifest abuse.

Same—Instructions—Presumption of Innocence.

13. The court, after fully instructing the jury relative to the presumption of innocence, gave an additional charge that such presumption was not intended to aid a person, who is in fact guilty of a crime, to escape proper punishment, but was designed to prevent the conviction of an innocent person unjustly accused. *Held*, that while the instruction might as well have been omitted, it correctly stated the purpose of the presumption and was not open to the complaint that, by implication, if not directly, it told the jury that if the defendant was in fact guilty of the crime charged against him, he was not entitled to the presumption of innocence.

Appeal from District Court, Park County; Sydney Fox, Judge.

BARNEY HANLON was convicted of murder in the second degree, and appeals from the judgment of conviction and from an order refusing him a new trial. Reversed and remanded.

Mr. W. B. Rodgers, Mr. John H. Tolan, Mr. Fred. L. Gibson, and *Mr. A. P. Stark,* for Appellant.

The court erred in excluding the evidence relative to what occurred in the Wellcome saloon on the night preceding the homicide. Even if the transaction there had been an independent transaction, and had not been referred to by the deceased as a threat against the defendant, and had stood alone, disassociated from any occurrence upon the ditch, it would nevertheless, under the modern and logical rule, be competent and material evidence, when communicated to the defendant, and would tend to show the just apprehensions of the defendant, and that he had reasonable grounds to believe that he was in danger of losing his life or receiving great bodily harm at the hands of the deceased, and it would tend directly and logically to show the state of the defendant's mind at the time he was assaulted, as he testifies he was by the deceased, and this is, of course, a most material inquiry. (*People* v. *Harris,* 95 Mich. 87, 54 N. W. 648; *Boyle* v. *State,* 97 Ind. 322; *Childers* v. *State,* 30 Tex. App. 160, 28 Am. St. Rep. 899, 16 S. W. 904; *State* v. *Burton,* 63 Kan. 602, 66 Pac. 633; *Bowlus* v. *State,* 130 Ind. 227, 28 N. E. 1115; *Sneed* v. *Territory,* 16 Okl. 641, 86 Pac. 71; *State* v. *Beird,* 118 Iowa, 474, 92 N. W. 694; *People* v. *Powell,* 87 Cal. 363, 25 Pac. 481, 11 L. R. A. 75; *State* v. *Shadwell,* 22 Mont. 573, 57 Pac. 281; *Cannon* v. *People,* 141 Ill. 270, 30 N. E. 1027; see, also, *Patten* v. *People,* 18 Mich. 326, 100 Am. Dec. 173; *Campbell* v. *Commonwealth,* 88 Ky 402, 21 Am. St. Rep. 349, 11 S. W. 290; *Larsen* v. *State* (Tex. Cr.), 29 S. W. 782; *Gunter* v. *State,* 111 Ala. 23, 56 Am. St. Rep. 17, 20 South. 633; *Renfro* v. *Commonwealth,* 11 Ky. Law Rep. 246, 11 S. W. 815; *Thomas* v. *State,* 44 Tex. Cr. 344, 72 S. W. 178; *Bowers* v. *State,* 122 Wis. 163, 99 N. W. 447; *State* v. *Thrailkill,* 71 S. C. 136, 50 S. E. 551.)

The exclusion of evidence which tended to show that, a short time previous to the encounter between the deceased and the defendant, the former was armed with a pistol, was error. (*Smith* v. *State,* 75 Miss. 542, 23 South. 264; *Fields* v. *State,*

46 Fla. 84, 35 South. 185; *Reynolds* v. *State*, 1 Kelly, 220; *King* v. *State*, 65 Miss. 576, 7 Am. St. Rep. 681, 5 South. 97; *State* v. *Graham*, 61 Iowa, 608, 16 N. W. 743.)

The question asked the witness Campbell as to why he had not mentioned the fact that he had taken a pistol from the body of the deceased, to anyone outside of counsel for defendant, was proper cross-examination. (*State* v. *McGahey*, 3 N. D. 293, 55 N. W. 753; *Williams* v. *State*, 61 Wis. 281, 21 N. W. 62.)

By the instruction found in paragraph 7 of the opinion, the court destroyed the fundamental principle which lies at the foundation of the administration of our criminal law, and deprived the defendant absolutely of the benefit of the just and legal effect of the presumption of innocence that attended him at every stage of the proceeding. In *Coffin* v. *United States*, 156 U. S. 453, 15 Sup. Ct. 394, 39 L. Ed. 481, the supreme court of the United States said: "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." For the effect and meaning of an instruction couched in such terms upon other, but analogous, propositions, see *Remsen* v. *People*, 43 N. Y. 6; *People* v. *Wileman*, 44 Hun, 187; *State* v. *Shadwell*, 26 Mont. 54, 66 Pac. 508; *State* v. *Sauer*, 38 Minn. 438, 38 N. W. 356; *State* v. *Lindley*, 51 Iowa, 343, 33 Am. Rep. 139, 1 N. W. 484; *Edgington* v. *United States*, 164 U. S. 364, 17 Sup. Ct. 72, 41 L. Ed. 467; *Territory* v. *Baca*, 11 N. M. 559, 71 Pac. 460. Sacred and pre-eminent above all other rights of the defendant is the right to have the benefit of the presumption of innocence at every stage of the proceedings against him, and have his guilt established beyond a reasonable doubt before he is convicted. (*Stapp* v. *State*, 1 Tex. App. 738; *Horne* v. *State*, 1 Kan. 42, 81 Am. Dec. 500.)

Mr. Albert J. Galen, Attorney General, and *Mr. W. L. Murphy*, Assistant Attorney General, for Respondent.

The exclusion of the offer of proof respecting the occurrences in the Wellcome saloon on the night preceding the shooting was

correct. It is true the general rule in a murder case is that threats communicated or uncommunicated, where self-defense is relied on, are competent for the purpose of showing the state of mind of the defendant at the time the killing took place, and also where doubt exists as to who commenced the affray. The offer of proof here, however, had to do with the misconduct of the deceased toward third persons, and no threat or threatening action toward this defendant can by any possibility be discovered in the incidents contained in the offer of proof. The great weight of authority is against the admissibility of this sort of evidence. (*People* v. *Henderson,* 28 Cal. 470; *Thomas* v. *People,* 67 N. Y. 223; *Eggler* v. *People,* 56 N. Y. 642; *People* v. *Druse,* 103 N. Y. 655, 8 N. E. 733; *People* v. *Rodawald,* 177 N. Y. 427, 70 N. E. 1; see, also, *Fitzhugh* v. *State,* 13 Lea, 258; *State* v. *Ronk,* 91 Minn. 419, 98 N. W. 334; *People* v. *Farrell,* 137 Mich. 127, 100 N. W. 265.) What a third person told defendant as to deceased's being a bad man, as to his having killed other men, is not admissible. (*Harrell* v. *State,* 39 Tex. Cr. 204, 45 S. W. 581.) Indeed, the doctrine seems to be generally recognized that the violent or dangerous character of the deceased can only be established by general reputation and not by specific acts, and in the cases herewith submitted the doctrine is announced without qualification that the exclusion of the offer of proof in question was correct. (*Garner* v. *State,* 28 Fla. 113, 9 South. 841; *People* v. *Gordon,* 103 Cal. 568, 37 Pac. 534; *Thornton* v. *State,* 107 Ga. 683, 33 S. E. 675; *Stalcup* v. *State,* 146 Ind. 270, 45 N. E. 334; *Davenport* v. *State,* 85 Ala. 336, 5 South. 152; *Campbell* v. *State,* 38 Ark. 498; *People* v. *Griner,* 124 Cal. 19, 56 Pac. 625; *Andrews* v. *State,* 118 Ga. 1, 43 S. E. 852; *Jenkins* v. *State,* 80 Md. 72, 30 Atl. 566; *People* v. *Dowd,* 127 Mich. 140, 86 N. W. 546; *King* v. *State,* 65 Miss. 576, 7 Am. St. Rep. 681, 5 South. 97; *McKenna* v. *People,* 18 Hun, 580; *State* v. *Mims,* 36 Or. 315, 61 Pac. 888; *Alexander* v. *Com.,* 105 Pa. St. 1; *State* v. *Dill,* 48 S. C. 249, 26 S. E. 567; see, also, *State* v. *Shadwell,* 22 Mont. 559, 57 Pac. 281.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant was convicted of murder in the second degree. He appealed from the judgment and an order denying his motion for a new trial.

The homicide occurred about 11:30 o'clock on the morning of June 6, 1907, at Jardine, in Park county. A few minutes prior to its occurrence the defendant was walking along the principal street of the village in company with one Acklemire. He was armed with a pistol, which he carried in a scabbard partly covered by his coat. The weapon was not concealed otherwise, and the fact that he had it was apparent to a casual observer. As he and his companion passed along the street, he observed the deceased standing on the opposite side, and, going across, accosted him, telling him that he desired to speak to him a moment. Thereupon the two walked back together, passing to a point near the rear of a small building which fronted upon the street, and stood apparently engaged in friendly conversation. They were in plain view to Acklemire, who stood at a point farther along the street, and to others on the opposite side. What was said by them was not heard by any witness. As they approached this point the deceased handed to defendant a small bottle of whisky. He retained the bottle, but did not drink. In a few moments one of the state's witnesses, named Menisto, familiarly called "Dago Joe," went across the street to them. He handed to the deceased a switch, or stick, described by him and other witnesses as about as thick as a man's little finger and about three feet long, at the same time stopping to drink from the bottle, which in the meantime had been returned by defendant to the deceased. He then went away. He had no conversation with either of the two except to say to the deceased as he handed him the stick, "That is your whip; I don't need that." To this the deceased replied, "All right, Joe." This witness had stated that a few minutes before the appearance of the defendant he had met the deceased with the stick in his hand and deceased had given it to him. Another witness stated

that the deceased was in the habit of carrying in his hand something of the character of the stick in question. After Menisto left, the conversation between the defendant and deceased continued. It was without gestures or loud talk. There was nothing in the manner of either of them to indicate that they were not on friendly terms or that the subject of their conversation involved any feeling. The two stood side by side for some moments, the deceased switching or digging into the ground with the stick. He then shifted his position somewhat so as to face the defendant, continuing to use the stick as before. While he was apparently looking toward the ground, the defendant drew his weapon and fired at him. This shot was apparently ineffective. The deceased began to back away, or, as some of the witnesses stated, began to run away. After a short interval the defendant fired two more shots in rapid succession, one of which struck the deceased just above the heart and passed through his body, killing him almost instantly. The defendant remained standing where he was when the deceased fell, holding his weapon in his hand in a menacing attitude toward some of those who ran to the assistance of the deceased, and applying vile epithets to them. There is some evidence to the effect that during the morning and at a previous time the defendant had made threats against the life of the deceased. The deceased had no other weapon than the small stick. This narrative of the occurrence is gathered from the testimony of the state's witnesses. It is controverted in some important particulars, as will appear from the following narrative of the defendant himself and his witnesses:

On the preceding day the defendant had been engaged in repairing a ditch belonging to a Mrs. Wellcome, who resided in the village. This ditch is a short distance to the east. Late in the evening, as he was about to finish the work, some one set off a charge of dynamite or giant powder in the ditch, with the double purpose, as defendant thought, of damaging the ditch and killing himself. The explosion occurred immediately after the defendant had crossed the ditch in the pursuit of his work and at the point where he crossed. He at once went away

and spent the night at Mrs. Wellcome's home. Mrs. Wellcome owned, or had an interest in, a saloon in the village which was run by two men named Wells and Oliver. During the night some one had, in the language of the witnesses, "shot up the place," doing a good deal of damage. Early on the next morning the defendant went with Mrs. Wellcome and others to see the extent of the injury. After Mrs. Wellcome went away, and while he and the others were still there, they heard two or three explosions in the direction of the ditch. Presently he and Acklemire, who was present, determined to go and ascertain the result of the explosions and, if possible, the cause also. This was the mission on which the defendant was bent when he observed deceased on the opposite side of the street, and, as he and some of his witnesses stated, was accosted by him and asked for an interview. What was said and done by the two after that time was stated by the defendant as follows: "Lannon says to me, 'Barney Hanlon, do you remember what Mr. Ryan told you the 15th of May? You remember what he told you about blowing you up with powder and striking you over the head with a heavy club?' I says, 'Yes, Tom, I remember about it'; and he says to me, 'Barney Hanlon, if you don't quit the old-timers and come to our side, with me and Hector McDonald and Billy McQuillan and Ryan and Zane, we will blow you to hell.' * * * He says to me, 'Barney Hanlon, if you don't quit, if you don't give up going with the old-timers and pull away from them, myself and Hector McDonald and Billy McQuillan and Ryan and Zane will blow you to hell.' I told him I would never quit the old-timers and go with an old —— of a —— like that, and go with 'cabbage thief' Ryan. * * * He says, 'Barney Hanlon, you remember what the old man said to you on the 15th of May outside the barber-shop?' And I says, 'Yes, I remember all about it.' * * * At the time I handed this bottle to Lannon, Lannon says to me, 'Barney, you wait a while; we have done with you fellows, and I will blow you to hell myself.' He made this remark to me three different times. He also said to me, 'You know what happened to the ditch last night. Well, we came pretty nearly getting you on the

ditch last night. Myself and Dougherty came pretty nearly fixing you last night, and if you don't give up running around with those old-timers we will blow you to hell.' When Joe Menisto, or 'Dago Joe,' came around the corner of the barber-shop he had a club with him and he gave the club to Tom Lannon, and Tom Lannon handed him the bottle, and when Lannon got the club he straightened up and gave the club, the heavy end of the club, two or three rubs, and he gave two or three rubs on the floor, and he came down double-handed and struck me right on the forehead. Just before he struck me with this club he told me if I didn't quit running around with the old-timers and go to their side, then they would blow me to hell. After he struck me with the club he took the club in one hand and came after me and made a dart into his pocket for a gun. When he struck me I started back, and he struck me such a blow that it staggered me back, and I went and pulled my gun and went to shoot him. I fired three shots; at the time I fired these shots I thought the man had me about dead. I saw right at once that Ryan's vengeance was pulling on me, and what he said about blowing me up at the barber-shop; and I went to work and tried to save my life. He also spoke about the Wellcome saloon, and said to me, 'You see what happened to Mrs. Wellcome's saloon last night?' And I replied I saw the damage it done; and he says, 'Barney Hanlon, if you don't quit running around with the old-timers we will blow you to hell.' * * * I have referred several times to what Mr. Ryan said to me at the barber-shop. I had this talk with Mr. Ryan on the 15th of May. They were trying a case at the barber-shop on that day. Tom Davey was the defendant in that case, and on that day I was working for Tom Davey. The conversation I had with Mr. Ryan was about twelve or thirteen feet southeast of the barber-shop, and it was about half-past 1 o'clock. Mr. Ryan told me that I was bringing men in to jump mining ground. He told me if I didn't stop bringing men around jumping ground that he would have me blown up or have my head broken with a club." Again, in referring to the attempt to blow him up on the Wellcome ditch, he made the following

statement: "That was on the 5th of June. I will explain to the jury what that attempt was. It was about half-past 8 in the evening; I walked over to the ditch there that I was in charge of and working on, and this man Lannon went to work and put a bomb of powder on the flume there and pretty nearly blew me up. That is the nearest I ever came to being blown up. He put the powder on the flume and it exploded. I had been at the point where the explosion took place not two minutes before. If I had been two minutes later, it would have blown me to pieces." On cross-examination he stated that, while in the act of backing away from him, the deceased drew a pistol, and when he fell he had it in his right hand, pointing as if to shoot, while with his left he was trying to open the rear door of the barber-shop, which he had reached at the moment the third shot was fired. He also stated that up to the time deceased struck him with "the club" they had always been good friends; that they had never had any trouble. Several witnesses controverted the statement of the defendant that the deceased struck him with the stick. Some of the eye-witnesses introduced by him testified that they saw the stroke, and stated that the defendant staggered under it. Others testified that immediately after the shooting there was a contusion over defendant's right eye, whereas it was not there immediately prior to the shooting; some stating that it had bled somewhat. One witness testified that, at the time the deceased fell, he himself was standing looking from an upper window in the rear of the barber-shop building, and saw a pistol drop as if coming from the hand of the deceased, and that he picked it up and kept it in his possession until the day of the trial. Others testified that, when the body of the deceased was picked up, a pistol was found in a hip pocket of his pantaloons. Still other witnesses stated that during the morning, shortly prior to the killing, the deceased had two pistols in his possession. On the whole, the evidence is exceedingly conflicting on this point. It appeared further that the Kimberly-Montana Gold Mining Company owned a mill and mining property at Jardine, and that the deceased was in its employ as night-shift boss; that Ryan was its managing director;

that there was some controversy between Mrs. Wellcome and the company over the ditch, referred to by the defendant, and that the three explosions heard by him while at the Wellcome saloon had been caused by the deceased and a man named Dougherty, also an employee of the company, in an effort to destroy the ditch. This somewhat extended statement we have deemed necessary to a clear understanding of the contentions of counsel arising upon the rulings of the court upon questions of evidence.

1. The defendant, admitting the killing, attempted to justify it on the ground of self-defense. During the giving of his testimony he stated, in substance, that he was not present at the Wellcome saloon on the preceding night, and had no personal knowledge of what took place there, but had learned about the occurrence from statements made to him by others, and from what he had seen of the result the next morning. Upon objection by counsel for the state that his statement would be hearsay and therefore incompetent, he was not permitted to give any of the details. Thereupon counsel offered to have him testify as follows: "That on the night preceding the time when he had the difficulty with Lannon, which resulted in his shooting Lannon in the manner heretofore described by him in his testimony, the deceased, Lannon, with several of his friends, went into the Wellcome saloon, which has been described in the testimony, and created a disturbance, which resulted in Lannon shooting up said saloon, to the injury and destruction of a considerable property therein, and the serious injury of one of the persons in charge thereof. That Lannon was armed at the time, and himself had done some or all of the shooting in the saloon; that deceased, immediately before he was shot by defendant, had referred to this affair in his talk with the defendant, and this defendant knew about the affair from statements made to him by others within a short time before his difficulty with Lannon, and had himself seen and observed the results of the difficulty in the saloon." This offer was rejected. The ruling is assigned as error.

It is argued that the evidence was admissible on the grounds: (1) That since the details of the incident had been communicated to the defendant, a statement of them, even though the incident had no direct connection with the affray, would have tended to furnish a basis for a conclusion by the jury that, when the defendant killed the deceased, he had just ground for apprehension that he was in danger of death or great bodily harm at his hands, and therefore acted in necessary self-defense; (2) that in view of the facts already appearing in the evidence, namely, that he was the servant of Mrs. Wellcome, that the saloon was her property, that the ditch had been damaged and an attempt made upon his life the evening before while he was at work on it, and for that reason; that another attempt had been made to destroy the ditch during the morning; that the deceased was the servant of the company, and that there was friction between Mrs. Wellcome and the company; that all these matters were called to his attention by deceased during their conversation, coupled with threats—the fact that the deceased had gone to the saloon armed, and wrecked it, incidentally assaulting and seriously injuring a person in charge of it—was one of the chain of events leading up to the tragedy, showing a continuing disposition in the deceased to violence, and would have aided the jury in arriving at a just conclusion as to who was the aggressor; and (3) that it would have corroborated the statement of the defendant as to what was said immediately prior to the killing, by tending to show that his statement was not a mere fabrication, as well as to enable the jury to understand the purport of the threats uttered by the deceased at that time.

Technically, the ruling was correct. The language in which the offer is couched indicates two purposes: First, to have defendant detail the events of the evening as upon his own knowledge, and, second, to have him state that he had been informed of them by others. Having no personal knowledge of them, a narrative of them by him, however material if properly established, would have been hearsay; for while he saw the damage done to the property, and, therefore, had personal knowledge

of the extent of it, he did not know that the deceased did it, nor that he was armed, nor that he assaulted the person in charge of the place. As we shall presently see, it was competent for him to state that he had received information of the occurrence from others, even to the extent of detailing what he had been told; yet, since the offer was formulated so as to include other evidence which was manifestly incompetent, the court committed no error in excluding the whole. Besides, the defendant had already testified, in substance, that he had been fully informed of the occurrence, and that the deceased had referred to it immediately before the affray.

2. Counsel then offered to show by another witness, who had been present at the saloon, that the deceased had given him and others money for the purpose of raising a disturbance there; that he and the deceased and others had gone there for that purpose, and did so; that the deceased fired numerous shots from his pistol through the bar mirror and broke up the glassware, and that he assaulted the barkeeper, knocking him senseless. This was excluded as immaterial. Counsel insist that it was competent on all the grounds urged in support of the foregoing assignment. It was held by this court in *State* v. *Shadwell*, 22 Mont. 559, 57 Pac. 281, that specific acts of violence by the deceased toward the defendant and toward others in his presence may be given in evidence upon the question whether the homicide was prompted by malice or by an honest belief that defendant was in danger of great bodily harm. Threats by the deceased against the defendant, communicated to the latter, are always admissible in such cases to show defendant's belief or apprehension of impending danger, subject to the restriction, however, that there must be some evidence of an overt act on the part of the deceased to carry the threats into execution. (*Territory* v. *Milroy*, 8 Mont. 361, 20 Pac. 650; *State* v. *Shadwell*, 26 Mont. 52, 66 Pac. 508.) If there be no such act or motion on the part of the deceased, there is no room for apprehension, no matter what threats may have theretofore been made and communicated to defendant; for mere words, though indicative of bitter hostility, cannot be alleged to justify the taking of

life. A given act might not in itself indicate a disposition to do violence, but the same act, viewed in the light of threats theretofore made, might well create just apprehension in the mind of the defendant, as a reasonable person, whereas but for the known threats there would be no ground for apprehension, and therefore no justification for the killing; so that the value of such threats, as evidence in this connection, is that they reveal to the jury the motives and impulses which actuated the defendant at the time of the killing. By the aid of this evidence, the jury may intelligently answer the question whether the deceased probably intended to carry his threats into effect, and whether the defendant acted upon the belief that such was the case. The measure of the probability that the deceased entertained such intentions would be the precise measure of the justification of the act of the defendant. (*State* v. *Felker*, 27 Mont. 451, 71 Pac. 668.) Of the same value are prior specific acts of violence toward the defendant himself or others in his presence. They show a disposition to violence, and, this disposition being known to the defendant, it may well be regarded as having aroused his fears and as having impelled him to act upon them, whereas otherwise he would have no ground for fears. This is the theory upon which they were held admissible in *State* v. *Shadwell*, *supra*. So, in *State* v. *Felker*, evidence of prior acts of violence by deceased toward his wife were held admissible in favor of the defendant, who alleged justification on the ground that he acted in defense of his sister, and this though he had not witnessed them. It is true that they were held admissible on the ground that they would have been competent in favor of the sister, had she been the defendant, and were therefore competent in Felker's favor, since he acted in her defense; but there is no substantial reason why such evidence should be deemed of value in such a case and of no value in another, where the violent disposition has been manifested toward third persons. If the violent disposition of Cunningham, as shown by his assaults, was of value to aid the jury in determining the motives which prompted Felker, for the same reason the acts of turbulent violence of the deceased here

would have aided the jury in ascertaining whether the defendant was prompted by malice or by apprehension of danger.

Naturally, after the defendant had been informed of the conduct of the deceased on the previous night, especially in view of the threats theretofore and then made, referring not only to the incidents at the saloon, but also to the attempt on defendant's life at the ditch (if, in fact, they were made, and it was a question for the jury whether they were or not), he would be more likely to attribute a dangerous import to any motion or action or apparent aggression by the deceased than he would otherwise have done, and justly so. The question for the jury to decide was, not whether it was really necessary for the defendant to defend himself, but whether it appeared to him, as a reasonable man, that the danger was imminent and the necessity pressing. This conclusion is not inconsistent with anything said in *State* v. *Shadwell,* 22 Mont. 559, 57 Pac. 281, and finds support in the following authorities: 1 Wigmore on Evidence, sec. 248; *People* v *Harris,* 95 Mich. 87, 54 N W. 648; *Boyle* v. *State,* 97 Ind. 322; *Childers* v. *State,* 30 Tex. App. 160, 28 Am. St. Rep. 899, 16 S. W. 903; *Cannon* v. *People,* 141 Ill. 270, 30 N. E. 1027; *Sneed* v. *Territory,* 16 Okl. 641, 86 Pac. 71; *State* v. *Beird,* 118 Iowa, 474, 92 N. W. 694; *State* v. *Hunter,* 118 Iowa, 686, 92 N. W. 872.

In *Boyle* v. *State, supra,* it was said: "As, in personal conflicts, every man is permitted, within reasonable limits, to act upon appearances and to determine for himself when he is in real danger, it would seem to follow, as an inevitable consequence, that whoever relies upon appearances, and a reasonable determination upon such appearances, as a defense in a case of homicide, ought to be allowed to prove every fact and circumstance known to him, and connected with the deceased, which was fairly calculated to create an apprehension for his own safety. Any narrower rule than this would, we think, prove inadequate to full justice in all cases of homicide, and would, in many cases, operate as a serious abridgment of the law of self-defense." In *State* v. *Felker, supra,* this court said: "The controversy as to who was in the wrong can be correctly

determined only by revealing to the jury, so far as may be, the exact relations, actions, and intentions of the parties to the affray, so that the jury may give due weight to every fact which influenced the mind of the defendant."

The admissibility of this character of evidence is not a violation of the well-settled rule that reputation may not be shown by proof of specific acts exhibiting the trait of character in question. This may be shown, of course, only by the testimony of witnesses who speak from knowledge previously acquired by hearsay in the community where the deceased had lived. Such evidence is admissible for the purpose of showing which of the parties to the affray was the aggressor, when there was no eyewitness or when the fact is in doubt.

The testimony was also relevant and material for the second reason urged by counsel. The incident in question had been referred to by the deceased. The threat, at least the implication, was that the same character of violence would be used toward the defendant in case he did not desist from his opposition to the company. The defendant had signified his contempt for Ryan, the managing director, and his intention to persevere in his previous course of conduct. The character of violence, then, wanton and unprovoked as it appears to have been, was material to show who was the aggressor; for it would have tended to show an aggressive and dangerous disposition in the deceased, not only then existing but continuing up to the moment of the affray, as well as to shed light upon the motives which prompted the deceased in seeking the defendant for the interview which ended in the affray. The incident, if the defendant's witnesses are to be believed, was but one of a series of acts of violence, beginning with that upon the ditch and including a renewal of like acts there the next morning, the first having been directed against the defendant as well as his employer. It was, in fact, one of several significant events leading up to the fatal affray. (*State* v. *Smith*, 12 Rich. (S. C.) 430; *Patten* v. *People*, 18 Mich. 314, 100 Am. Dec. 173; *People* v. *Hecker*, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403; *State* v. *Beird*, *supra*.)

Some courts exclude this character of evidence altogether, unless the particular acts of violence form a part of the *res gestæ*. (*Thomas* v. *People*, 67 N. Y. 218.) Even the same courts that admit evidence of such acts, when they have been observed by the defendant, as in Michigan (*People* v. *Harris*, *supra*), exclude evidence of all such as are not connected with or observed by him, as too remote and as giving rise to collateral issues, the investigation of which would confuse the issue on trial. (*People* v. *Farrell*, 137 Mich. 127, 100 N. W. 265.) But no hard-and-fast rule of exclusion may be laid down. A wise discretion should be the guide, and in all cases where the specific act, by reason of its proximity in time and place, would legitimately reflect upon the conduct or motives of the parties at the time of the affray, and especially when, as in this case, it bears some relation to the main fact, the homicide, it should be admitted. (1 Wigmore on Evidence, 248.) It is within the purview of this limitation that we hold the evidence offered in this case to be admissible. The fact that collateral issues may be presented in a particular case cannot be held conclusive against the value of the evidence; for even in cases where communicated threats are admissible, whether they were made or communicated may be controverted, and thus a collateral issue presented. So, too, such an issue may arise upon the evidence tending to show specific acts of violence, testified to as having been done to defendant himself or to others in his presence. If the rule that the presence of such an issue is sufficient reason to exclude the evidence must prevail, then its admissibility would always depend upon whether the doing of the particular act is admitted or not controverted.

Under the circumstances presented in this case, we think the evidence was also admissible on the third ground. The fact that the incident had actually occurred would have tended, in some measure at least, to corroborate the testimony of the defendant and show that his report of the conversation which occurred between him and the deceased was not a fabrication. And, as we have already stated, it would have enabled the jury to understand the purport of the threats uttered by the deceased

at that time. While the offer should have included, also, the fact that the witness had communicated the conduct of deceased to defendant, in view of the fact that the latter had already shown that he had been made acquainted with it, the offer was sufficiently comprehensive to make the evidence admissible for all purposes.

3. Houseman, one of the witnesses for the state, had testified to certain threats made by the defendant against the deceased a short time prior to the homicide. His evidence had shown that he was interested with Ryan in the Kimberly-Montana Gold Mining Company through a corporation organized to take over its property. He was not at Jardine on the day of the difficulty, but was a few days afterward. He further stated that he had been compelled to appear as a witness against his will. On cross-examination he was asked if he was not at the saloon of one Malloy, in Jardine, on or about July 1, and if he did not at that time, in the presence of certain persons named, state that the deceased had done just what he and Ryan had told him to do, when he batted the defendant over the head with the club that morning, referring to the time of the homicide. He was not permitted to answer, on the ground that the question was not proper cross-examination. This was error. His evidence in chief was material and damaging to defendant. Without reference to his interest in the company or his association with Ryan, his answer in the affirmative would have shown a condition of mind adverse to the defendant, and, to that extent, that he was an interested witness. A negative answer would have opened the way for contradictory evidence by the persons who heard his statements. The inquiry was well within the bounds of legitimate cross-examination. (Revised Codes, sec. 8021; *Kipp* v. *Silverman*, 25 Mont. 296, 64 Pac. 884.) The witness was then questioned, and gave answers as follows: "Q. Did you know a man by the name of Duffy, a Pinkerton detective, who was sent out from Chicago to work up this case? A. He is a McGuire & White detective. Q. Was it at your instance or at the instance of your company that he was sent out here? A. I really don't know who sent him out here. I

think he was in the interest of the company. I didn't see him, nor did I know Mr. Ryan, and I knew, however, that he was there." On motion of counsel for the state, all of this testimony was stricken out. The ruling was correct. If it be assumed that it was material to show that the company had employed a detective to gather evidence for the prosecution, the statements of the witness showed a want of knowledge of the fact sufficient to enable him to testify to it.

4. A witness by the name of Campbell testified, as already narrated, that at the time when the shooting occurred he was looking from an upper window in the rear of the barber-shop building; that when the deceased fell he saw a pistol fall as if coming from the hand of the deceased, and that he picked it up and kept it until the day of the trial. It had appeared from his statement that he had gone down the stairway to the body, picked up the pistol, put it under his coat and returned immediately to his room above, and concealed it in his bed. On cross-examination it appeared that he had been questioned by the sheriff a few days afterward as to whether he saw a pistol taken from the body of the deceased, and had stated that he had not. He had stated further that he had told Mr. Gibson, one of counsel for the defendant, that he had picked up the pistol, but had told no one else in that locality, meaning Jardine. On re-examination he was asked why he had not mentioned the fact to anyone else. He was not permitted to answer. The purpose of the question was to allow the witness to explain his silence, and thus to remove suspicion that his story was a fabrication. It was competent for this purpose, especially so in view of his apparently inconsistent statement to the sheriff and the material importance of his evidence; and, if he had a reason or explanation, he should have been allowed to give it. (*State* v. *Welch*, 22 Mont. 92, 55 Pac. 927.)

5. The defendant's witness Miller testified, in substance, that he knew defendant and deceased; that he met the latter at Jardine during the latter part of May, 1907; that he then had a gun; that he stated to the witness that he was going up to a mining claim belonging to the company, giving its name, and

that if the defendant was there he was going to put him off; that the deceased and another then got horses and went away, and having presently returned with his companion, he stated to the witness that he did not find the defendant. On motion of counsel for the state, the whole of the statement was stricken out as hearsay. The ruling was erroneous. The evidence tended to show in deceased a spirit of hostile antagonism toward the defendant, as well as a disposition to take the law into his own hands, as evinced by the fact that he was armed and that he intended, as his declaration implied, that violence would be resorted to if necessary in order to accomplish the mission upon which he was bent. This is true whether he was acting for the company or upon his own motion. While it may well be said that the evidence was in itself of slight weight or value, it comes within the rule of admissibility heretofore stated. It should have been allowed to stand.

6. Error is assigned upon the action of the court in excluding the evidence of several witnesses by whom the defendant offered to prove, substantially, the following: That for three years prior to and including June 6, 1907, there were two factions among the people residing and doing business at Jardine, one called the company faction, and the other the old-timers' faction; that practically every one there was identified with one or the other faction; that the first consisted of Ryan, the manager and managing director of the Kimberly-Montana Gold Mining Company, which owned quartz-mills and worked and operated several mining claims in connection therewith, and owned most of the real estate included in the site of the village, and the employees and agents of the company, among them the deceased and others associated with the company in the conduct of its boarding-house and saloon; that the other consisted of all old residents and early locators of mining claims there, together with others who were not connected with the company in any way; that the defendant was identified with the latter faction, and owned a mining claim adjoining the property of the company; that it was the declared purpose of Ryan to

drive all old-timers from the camp; that in August, 1905, Ryan proposed to one of the witnesses that if the witness would act as the leader, he, Ryan, would furnish all the men, arms, and ammunition necessary to drive all the old-timers out; that as late as May 13, 1907, Ryan, in a conversation with one of the witnesses, expressed the intention to carry out the purpose of the company faction; that at the same time the witness was employed by the defendant to work on his claim; that the witness had located claims adjoining those of the company; that he was an old-timer; that, just after the conversation referred to, Ryan, aided by Houseman, one of the state's witnesses, assaulted him; that deceased was at this time night-shift boss of the company, and was closely associated with Ryan; that in the month of October, 1906, the deceased, then on his way to Butte, declared to another witness: "I am coming back in the spring, * * * and drive all you old-timers out of the camp"; that this witness also belonged to the old-timers' faction; that Ryan was unfriendly to all of them, and had been using every means to compel old-timers to leave the camp. This recital has been gathered from the offers to prove by different witnesses. The evident purpose of counsel was to show that a conspiracy had been formed by Ryan and his associates, including the deceased, to get rid of the trouble that had arisen, as is suggested by other evidence in the record, between the company and some of the owners of adjoining property, and to this end to force them by violence, if necessary, to abandon their claims and leave the locality; and that the affray resulting in the homicide was due to this factional strife.

It may well be said that no one of the different offers, standing alone, was sufficiently comprehensive to show that the facts embodied in it would throw any light upon the mental attitude and actions toward each other of the parties to the affray, and, therefore, that the court did not err in excluding the evidence as offered. Yet, since another trial must be had for the reasons heretofore stated, it will not be out of place to state briefly our views as to whether, if offered in proper form, the evidence would be of value. If it could be made clear by competent

evidence, direct or circumstantial, that friction producing enmity had grown up between the company's officers and employees and the defendant and others, as Mrs. Wellcome, over the possession and title to mining property in the neighborhood, and that the former had determined to adopt measures to rid the community of those upon whom they cast the blame for this condition, and these measures contemplated the employment of force and violence, and that various acts and threats had been done and made looking to the accomplishment of the common purpose, the defendant being one of the class of persons against whom the hostile and violent purpose was directed, could it for a moment be doubted that this evidence would be competent as reflecting upon the attitude of defendant's mind and that of the deceased at the time of the meeting and at the moment the affray began? Such an agreement or general understanding by the agents and employees of the company would amount to a criminal conspiracy. Each participant would be responsible for the acts and utterances of every other in furtherance of the common purpose. Its existence would evince a hostile and aggressive condition of mind in each member of it, not only toward the class of persons of which the defendant was one, but toward the defendant as an individual; and, if its existence were known to him, it would amount to a constant threat communicated to him, and be well calculated to arouse his fears as to his personal safety whenever there should be an apparent effort on the part of any member of the conspiracy to carry out the announced purpose of it. A hostile threat against a class of persons is a manifestation of a hostile state of mind against each person of that class. (*State* v. *Davis,* 6 Idaho, 159, 53 Pac. 678; *People* v. *Craig,* 111 Cal. 460, 44 Pac. 186; *People* v. *Gross,* 123 Cal. 389, 55 Pac. 1054.)

If the fact of the conspiracy were not known to the defendant, yet the fact of its existence would reflect the attitude of mind entertained by the deceased at the time he sought the interview with the defendant, and would reflect upon the question as to who was the aggressor. Words and acts of one of a class of persons associated together for an unlawful purpose, im-

porting hostility toward another, are imputable to all who belong to that associated class, and, upon an issue of self-defense upon a charge of unlawful homicide alleged to have been committed upon one of the class by such other person while the former was apparently in pursuit of the common hostile purpose, should be received in evidence in favor of the latter for the same purpose and under the same limitations as evidence of specific acts of violence by the former, the admissibility of which has already been discussed. If such acts and threats were the outgrowth of a common design and purpose, they were but links in a series of circumstances leading up to the fatal encounter, and legal responsibility for the result might be determined by a consideration of them. That proof of such facts would lead to an examination of collateral issues is not a conclusive reason that such evidence should be excluded. If a fact is material, evidence of it may not be excluded because its existence may be disputed. As the admissibility of the evidence itself must rest largely in the sound discretion of the trial court, so must the extent to which the investigation of collateral issues arising thereon may go be lodged in its discretion, and its action will not be reviewed except where its discretionary power has been manifestly abused.

7. The contention is made that the court erred in submitting the following instruction: "You are further instructed that the law which throws around the defendant the presumption of innocence, and casts upon the state the burden of proving his guilt beyond a reasonable doubt, was not intended to aid any person who is in fact guilty of crime to escape the proper punishment thereof, but is a humane provision of the law intended, so far as human agencies can, to prevent the conviction of any innocent person who may be unjustly accused of crime." The argument is that the court, by implication, if not directly, told the jury that, if the defendant was in fact guilty of the crime, he was not entitled to the presumption of innocence. While we think the instruction might just as well have been omitted, it does not bear the construction given it by counsel. The presumption of innocence,—the benefit of which everyone has

under the law,—is not intended to protect the guilty. It is a witness in favor of the accused, and furnishes substantial protection to him throughout the trial and until his guilt has been established beyond a reasonable doubt. When the evidence, however, has established the fact of guilt beyond a reasonable doubt, the law is satisfied, the presumption has been overcome, and its office is ended. The instruction states correctly its purpose. If the court had failed to go further and instruct fully upon the subject, complaint might justly have been made, but this the court did, adding the paragraph in question as a precautionary explanation of the purpose of the law, and in doing so it did not err.

The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. JUSTICE SMITH concurs.

MR. JUSTICE HOLLOWAY: I agree with the conclusion reached, but I do not agree with what is said in paragraph 2 of the majority opinion. In my judgment, evidence of the character of that to which reference is there had should be excluded, unless the acts or declarations to which it relates form a part of the *res gestæ*.

CARLSON, RESPONDENT, *v.* CITY OF HELENA, APPELLANT.

38 581
s39 96
s39 115

(No. 2,694.)

(Submitted March 27, 1909. Decided April 12, 1909.)

[101 Pac. 163.]

Appeal—Dismissal—Collusion Between Parties—Evidence—Insufficiency.

Appeal—Dismissal—Collusion—Evidence.

1. In order to justify the dismissal of an appeal on the ground of collusion between the parties, it must appear with reasonable certainty that they are guilty of the abuse charged in the motion to dismiss; else the appeal will be retained and reviewed on its merits.

Same—Evidence—Insufficiency.

2. Plaintiff commenced an action to test the validity of certain bonds sought to be issued by a city. A demurrer was filed and sub-

mitted without argument, counsel for both parties, however, offering to submit briefs if desired by the court. The demurrer was overruled and defendant appealed. Thereupon certain members of the bar appeared as *amici curiæ* and moved that the appeal be dismissed on the ground of collusion. The evidence disclosed that plaintiff voted for the bonds, and that he would prefer to see them held valid; that counsel for defendant assisted his counsel in the preparation of the complaint, but that of this he had not any knowledge; and that he expected to pay the necessary costs and counsel fees; that he had no understanding or agreement with anyone as to the bringing of the suit or as to the issues he would present therein, or that anyone else would bear any part of the expenses. *Held*, not to warrant dismissal of the appeal on the ground alleged.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by Oscar Carlson against the City of Helena. Judgment for plaintiff, and defendant appealed. Motion to dismiss denied.

Mr. Edward Horsky, and *Mr. T. J. Walsh,* for Appellant.

Mr. C. W. Wiley, for Respondent.

Messrs. Gunn & Rasch, and *Messrs. Walsh & Newman, amici curiæ.*

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by the plaintiff to enjoin the city of Helena from issuing bonds to the amount of $670,000 to provide funds to enable it to procure a water supply and install a system of mains, pipes, etc., for its distribution, and to extend its sewer system. Various reasons are alleged why the proposed bonds will be invalid. The district court overruled a general demurrer to the complaint, and, the defendant having declined to plead further, rendered and caused to be entered a judgment enjoining it and its officers from proceeding further in the premises. Thereupon defendant appealed.

When the record was filed in this court, counsel for the defendant filed a motion in writing asking that the cause be

advanced upon the calendar for a speedy hearing and determination, to the end that, if the bonds be adjudged to be lawful, the defendant and its officers may proceed with the sale of them, notice of which, it is alleged, has already been given, fixing May 1 as the date of sale. On the day this motion was filed Messrs. Gunn & Rasch, members of the bar, asked leave to appear as *amici curiæ*, and submit a motion to dismiss the appeal on the ground that the action is "sham and fictitious, and colorably and collusively instituted between the said plaintiff and respondent, Oscar Carlson, and the said defendant and appellant, the city of Helena, without intention of determining in good faith any dispute or litigating any question, or ever having any adversary trial, but simply for the purpose of obtaining the judgment and decision of the courts upon a feigned issue, in order to affect and control the determination of another case of great importance now pending in the United States courts, in which the said city of Helena is defendant and the Helena Waterworks Company, a corporation organized and existing under and by virtue of the laws of the state of New Jersey, is complainant, and which involves large amounts of money and very important and serious questions as to the right and authority of said appellant, the said city of Helena, to incur any indebtedness and issue any bonds of the said city of Helena for the purpose of procuring a water supply and constructing a water system for said city; that the said plaintiff and respondent and the said defendant and appellant in said above-entitled cause were in instituting said action, and they are by said appeal, seeking to secure such a final judgment to be entered in said cause as might result to the advantage of the said defendant and appellant with reference to the validity of the said bonds of the said city of Helena to the amount of $600,000, proposed to be issued and sold by it for the procurement of a water supply and the construction of a water plant and water system mentioned in said complaint, and adversely to the interest of the said Helena Waterworks Company and other parties who are property owners and taxpayers in said city, and who had no knowledge of this action, and no opportunity to be

heard, and have any interest they might have in the subject matter of said action properly determined." This motion was accompanied by an affidavit alleging facts furnishing sufficient ground to justify the court in making inquiry touching the charges made. The motion and affidavit were ordered filed, and counsel in the case were required to appear on the twenty-seventh day of March, 1909, and make a presentation of the facts. On the day of the hearing additional affidavits were filed, both by the movants and counsel in the case; Messrs. Walsh & Newman, members of the bar, being also allowed, upon application for leave of court to do so, to appear in aid of the movants and as representatives of taxpayers other than the waterworks company. The original files in this action and also in the action pending in the circuit court of the United States were also submitted. Counsel for the city and for the plaintiff were examined orally, as was also the plaintiff himself.

Were we to conclude that the charges laid in the motion are supported by the evidence, we should feel constrained not only to dismiss the appeal, but also to proceed against both clients and counsel for contempt. "It is the office of courts of justice to decide the rights of persons and property when the persons interested cannot adjust them by agreement between themselves—and to do this upon the full hearing of both parties. And any attempt by a mere colorable dispute to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real or substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court." (*Lord* v. *Veazie*, 8 How. 251, 12 L. Ed. 1067.) And this view has frequently been announced by the courts. (*Gardner* v. *Goodyear Dental Vulcanite Co.*, 131 U. S. ciii (Appdx.), 21 L. Ed. 141; *Hatfield* v. *King*, 184 U. S. 162, 22 Sup. Ct. 477, 46 L. Ed. 481; *Fesler* v. *Brayton*, 145 Ind. 71, 44 N. E. 37, 32 L. R. A. 578; *Haley* v. *Eureka County Bank*, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815; *Ward* v. *Alsup*, 100 Tenn. 619, 46 S. W. 573; *McAdam* v. *People ex rel. Joslyn*, 179 Ill. 316, 53

N. E. 1102; *Cleveland* v. *Chamberlain,* 1 Black (U. S.), 419, 17 L. Ed. 93; *Van Horn* v. *Kittitas County* (C. C.), 112 Fed. 1; *Connoly* v. *Cunningham,* 2 Wash. Ter. 242, 5 Pac. 473; *State ex rel. Hahn* v. *City of Westport,* 135 Mo. 120, 36 S. W. 663; *Berks County* v. *Jones,* 21 Pa. St. 413; *Meeker* v. *Straat,* 38 Mo. App. 239.) This court has in several cases held that even when, pending an appeal, the parties settle their controversies, and the fact is made to appear, the appeal will be dismissed; for under such circumstances there is no controversy left to be determined. (*State ex rel. Begeman* v. *Napton,* 10 Mont. 369, 25 Pac. 1045; *Snell* v. *Welch,* 28 Mont. 482, 72 Pac. 988; *In re Black's Estate,* 32 Mont. 51, 79 Pac. 554; *State ex rel. Brass* v. *Horn,* 36 Mont. 418, 93 Pac. 351.)

Two classes of cases fall within the rule, viz., moot cases, or those in which there is no real controversy, or in which, though there has been a real controversy, it has been adjusted; collusive cases which fall within the definition: "In law a deceitful agreement or compact between two or more persons for the one party to bring an action against the other for some evil purpose, as to defraud a third person of his right; a secret understanding between two parties who plead or proceed fraudulently against each other to the prejudice of a third person; a secret arrangement between two or more persons, whose interests are apparently conflicting, to make use of the forms and proceedings of law in order to defraud a third person, or to obtain that which justice would not give them by deceiving a court or its officers." (7 Cyc. 398.) To the first class may be assigned those cited from the decisions of this court *supra;* while *Lord* v. *Veazie* and *Haley* v. *Eureka County Bank, supra,* are types of the second class. One of the first class may be brought within the definition of the second class and become collusive, when, after the parties have adjusted their rights, one of them by agreement becomes *dominus litis,* by assuming to pay the expenses of the litigation and counsel fees in order to have the case conducted to a final hearing and judgment to effect some ulterior purpose. *Gardner* v. *Goodyear Dental Vulcanite Co., supra,* is a type of this class. But the rule announced in these

cases does not preclude amicable actions instituted and conducted by the use of the ordinary forms of procedure, or by the submission of agreed cases. Indeed, our statute provides for the institution of actions by the latter method, and thus may be said to encourage them, provided always they involve a real controversy. (Revised Codes, sec. 7254.) The submission of such cases is of frequent occurrence. (*Hauswirth* v. *Mueller,* 25 Mont. 156, 64 Pac. 324; *State* v. *Northern Pac. Express Co.,* 27 Mont. 419, 94 Am. St. Rep. 824, 71 Pac. 404; *Hogan* v. *Cascade County,* 36 Mont. 183, 92 Pac. 529; *Northwestern Mutual Life Ins. Co.* v. *Lewis and Clark County,* 28 Mont. 484, 98 Am. St. Rep. 572, 72 Pac. 982.) On this subject Chief Justice Taney, in *Lord* v. *Veazie, supra,* said: "And in a case of that kind it sometimes happens that, for the purpose of obtaining a decision of the controversy, without incurring needless expense and trouble, they [the parties] agree to conduct the suit in an amicable manner; that is to say, that they will not embarrass each other with unnecessary forms or technicalities, and will mutually admit facts which they know to be true, and without requiring proof, and will bring the point in dispute before the court for decision without subjecting each other to unnecessary expense or delay. But there must be an actual controversy and adverse interests. The amity consists in the manner in which it is brought to issue before the court. And such amicable actions, so far from being objects of censure, are always approved and encouraged, because they facilitate greatly the administration of justice between the parties." Without giving special notice to any of these cases, we may safely say that they all recognize the rule that it must appear at least with reasonable certainty that the parties in the particular case are guilty of the abuse charged as the ground of the motion, or the case or appeal will be retained and heard or reviewed on the merits.

We shall not undertake to set forth and analyze the somewhat voluminous evidence submitted at the hearing. The action pending in the circuit court of the United States does not involve one of the important issues involved in this case.

The injunction issued therein restrains the sale of the bonds issued under the ordinance of the city in force at the time of their issuance on the ground that the ordinance itself departed from the provisions of the statute (Revised Codes, sec. 3459) in providing that interest should be due and payable on the first days of October and April, respectively, instead of on the first days of January and July, respectively, and on the further ground that the bonds had not been sold at auction in pursuance of the notice of sale given and the provisions of the statute (Revised Codes, sec. 3456). One of the principal questions involved in this case is whether the bonds were properly authorized by the election, and will be valid if issued and sold under an ordinance passed by the city council on March 1, 1909. But, even if the issues in the two actions were the same, this would not preclude any other taxpayer from testing the validity of the bonds by action in one of the state courts. Nor would an action by a taxpayer in a state court preclude another from instituting a like action. One taxpayer cannot monopolize all the courts by bringing such an action; nor can he require others to join him in his action, and be confined to the trial of issues formulated by him. Any taxpayer may bring an action in such a case. A judgment obtained upon the questions presented therein, however, would not bind either the court or parties in another action presenting questions arising out of different issues.

The facts revealed by the evidence wholly fail to show that other taxpayers, including the waterworks company, will be injuriously affected by the result of this case. Much evidence was introduced to show that the judgment sought in the district court was, by understanding between the district judge and counsel for plaintiff and the city, to be merely *pro forma* in order to get the case before this court for final decision. There is a conflict of evidence on this point, and it cannot be said that the fact is so clearly and satisfactorily established as to justify a conclusion of this court which would subject the presiding judge and counsel to punishment for contempt as well as leave them open to disbarment proceedings. It is true that there

was no argument when the demurrer was submitted. But the presiding judge was about to leave the city to hold court in Broadwater county, and was pressed for time, and counsel both stated that they were ready to submit briefs if he required them. While it appears from his affidavit that he subsequently overruled the demurrer without examination of the complaint, this fact does not prove that the issue is feigned, or that the plaintiff's case did or does not deserve consideration. Besides, it appears that prior to the institution of this action the plaintiff contemplated bringing an action to test the validity of the issue of bonds which were in controversy in the federal court. but desisted, being ready, as he said, to abide by the action of that court. When it was expected that another ordinance would be passed obviating the defects in the proceedings affecting the first issue, he authorized his counsel to prepare his complaint and be ready to proceed. He assumed to pay, and testified that he expected to pay, the necessary costs and counsel fees; that he had no understanding or agreement with anyone as to the bringing of the suit or as to the issues that he would present therein, or that anyone would bear any part of the expenses. He stated that he voted for the bonds, and that he desired to see the city own its own water supply and plant. Whether the court reversed the judgment of the district court or not, he wished to see the validity of the bonds tested and the controversy over the issuance of bonds for that purpose, which had existed for so long a time, a fact not disputed by anyone, finally settled, and that his purpose in bringing the action was to accomplish this end. While he did not state that he desired to see the judgment of the district court reversed and the bonds declared valid, the inference is clear that he would prefer that result. In some cases it has been held that the courts will not entertain an action under such circumstances. (*Berks County* v. *Jones,* 21 Pa. St. 413; *State ex rel. Hahn* v. *City of Westport,* 135 Mo. 120, 36 S. W. 663.) By other courts it is held that, when the controversy involves questions of public interest arising upon the construction or validity of statutes and the like, the fact that the parties entertain the same views

with reference to them does not render the action collusive. The court nevertheless has jurisdiction to proceed and will not dismiss the action, if the sincerity of the plaintiff is apparent. (*Parker* v. *State ex rel. Powell*, 132 Ind. 419, 31 N. E. 1114; *Wilmington & W. R. Co.* v. *Board of Railroad Commissioners* (C. C.), 90 Fed. 33; *Adams* v. *Union R. Co.*, 21 R. I. 134, 42 Atl. 515, 44 L. R. A. 273.)

Counsel for defendant in this case assisted counsel for plaintiff in the preparation of the complaint. So far as the evidence shows, plaintiff had no knowledge of this fact. In pursuing this course, however, counsel did no more than they would have done had they agreed upon a case to be submitted under the statute.

We do not wish to be understood as offering any encouragement to the bringing of actions upon feigned issues for the purpose merely of enabling the parties to ascertain what the law is; yet, under circumstances such as are presented in this case, we are not inclined to refuse to entertain jurisdiction. Counsel for other taxpayers may appear and have the privilege of argument, with the result that the judgment finally rendered in the case will, so far as it determines all questions really at issue, be a just and proper determination of the rights of their clients as well as those of the plaintiff. The motion is denied.

Motion denied.

MR. JUSTICE SMITH and MR. JUSTICE HOLLOWAY concur.

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39 585

CARWILE, RESPONDENT, v. JONES, APPELLANT.

(No. 2,662.)

(Submitted March 17, 1909. Decided April 12, 1909.)

[101 Pac. 153.]

Elections—Ballots—Manner of Marking—Statutes—Mutilated Ballots—Qualified Voter—Residence—"Removal."

Election Contest—Ballots—Manner of Marking—Statutes.

1. In an election contest the court properly refused to count for the Democratic candidate ballots marked as follows: (1) Where the cross was placed after the candidate's name and entirely without his party column; (2) where perpendicular lines were drawn through the names in the Republican column, but no cross was placed before his name; and (3) where his name was written in the Socialist column but no cross marked in the square before the name. In neither instance was there a substantial, or any, compliance with the provisions of section 552, Revised Codes, relative to how the elector shall prepare his ballot.

Same.

2. By placing a cross in the square before the blank space left below a candidate's name, and failing to write in such blank space the name of some person for whom he desired to vote, the elector did not vote for anyone.

Same.

3. The court properly refused to count a ballot for the Republican candidate which was marked by crossing out all the names in the other columns, but which failed to show an "X" before his name. While the intention of the voter is generally a very material consideration, he must express his intention substantially as indicated by the statute.

Same—Ballots—Indorsement by Election Judges—Surplusage.

4. A ballot bearing the indorsement: "Voted by H. and M. [judges of election] for illegibility of voter," was not void on the ground that the reason given for assisting the voter was not one recognized by law. Section 555, Revised Codes, does not require the judges to certify the reason for assisting an elector, and the words "for illegibility of voter" were therefore surplusage; and in the absence of a showing why they gave assistance, it will be presumed that they regularly performed their official duties.

Same—Ballots—Manner of Marking.

5. Where the cross-mark was placed *after* the candidate's name but within his party column, the ballot was void, since the elector did not substantially comply with the requirement of section 552, Revised Codes, that the "X" must be placed *before* the name.

Same—Ballots—What Constitutes an "X."

6. Any mark within the square before the candidate's name, which can be said to be a crossing of two lines, will answer the requirement of the statute that the elector must place an "X" in such square; and in the absence of anything to indicate a purpose on his part to identify his ballot by the use of a third line within the square, a defect in the mark is not sufficient to vitiate the ballot.

Same—Ballots—Manner of Marking.

7. The Socialist party had no candidate for the office over which the contest arose. A cross was placed before the name of every candidate in the Republican and Socialist columns, and the names in the other party columns had been crossed out. *Held*, that the ballot should not have been counted for the candidate in the Republican column. The ballot was one from which it was impossible to determine the elector's choice, and therefore void under section 575, Revised Codes. (MR. JUSTICE SMITH dissents.)

Same—Ballots—Failure to Detach Stub—Effect.

8. The court erred in refusing to count a ballot, properly marked, but from which the stub had not been detached by the ballot judge as required by section 552, Revised Codes. A voter may not be disfranchised by the errors or wrongful acts of election officers.

Same—Mutilated Ballots—Presumptions.

9. In the absence of any showing that a ballot was mutilated by the elector, the presumption is that the mutilation occurred after the ballot left his hands.

Same—Ballots—Mutilation by Officers—Effect.

10. Where it was apparent from an inspection of a mutilated ballot, found in the ballot-box in two separate pieces and with one portion containing the names of two candidates in each party column missing, that it was torn by the ballot judge in detaching the stub, the court erred in refusing to count it.

Same—Qualified Voter—Residence—"Removal."

11. During the months of July, August and October, 1907, certain persons came to Montana from the state of Iowa. They then selected and filed on homesteads, with the intention to make this state their future home. Shortly thereafter they returned to Iowa, without having made any improvements on their homesteads, for the purpose of arranging their affairs preparatory to returning to this state. In the spring of 1908, each brought his family to Montana and settled on his respective homestead, residing there continuously thereafter. None of them voted in Iowa between the fall of 1907 and the spring of 1908. They voted at the general election held in November, 1908. *Held*, that the court committed error in ruling that they were not legal voters; *held*, further, that having formed the intention, when filing on their homestead, to make Montana their future home, this state became and was their place of residence in the sense of that term as used in the election laws, and that their coming to this state in the summer of 1907, coupled with the selection of their new homes, constituted their "removal" from their former home.

Appeal from District Court, Yellowstone County; W. R. C. Stewart, Judge, presiding.

ELECTION CONTEST by Nat. G. Carwile against Lorin T. Jones. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Mr. Harry L. Wilson, and *Mr. Fred. H. Hathhorn*, for Appellant.

Mr. W. M. Johnston, for Respondent.

Respondent in an election contest may have errors appearing on the record reviewed, though he takes no appeal. (*Vorhees* v. *Arnold,* 108 Iowa, 77, 78 N. W. 797; *First Nat. Bank* v. *Wright,* 84 Iowa, 728, 48 N. W. 91, 50 N. W. 23.) "The mere personal presence of a person otherwise qualified in a voting precinct, for the period required by law, does not necessarily constitute such person an elector, unless he has moved in with the honest and settled intention of acquiring a new domicile." (*Jain* v. *Bossen,* 27 Colo. 423, 62 Pac. 194; see, also, *Sharp* v. *McIntire,* 23 Colo. 99, 46 Pac. 115; *Fry's Election Case,* 71 Pa. St. 302, 10 Am. Rep. 698; *Moffett* v. *Hill,* 131 Ill. 239, 22 N. E. 821; *Carter* v. *Putnam,* 141 Ill. 133, 30 N. E. 682; *Warren* v. *Thomaston,* 43 Me. 406, 69 Am. Dec. 70.) An intention to change one's domicile, without an actual removal with the intention of remaining, does not cause a loss of domicile so as to deprive a party of his right to vote. (*State* v. *Hallett,* 8 Ala. 159; *Shepard* v. *Allen* (Ill.), 17 N. E. 756; *William* v. *Whiting,* 11 Mass. 424. See, also, *Cary* v. *Tice,* 6 Cal. 626; *Barney* v. *Oelrichs,* 138 U. S. 529, 11 Sup. Ct. 414, 34 L. Ed. 1037; *Frost* v. *Brisbin,* 19 Wend. 11, 32 Am. Dec. 423; *Lawson* v. *Adlard,* 46 Minn. 243, 48 N. W. 1019; *State* v. *Allen,* 48 W. Va. 154, 86 Am. St. Rep. 29, 35 S. E. 990, 50 L. R. A. 284; *Shaeffer* v. *Gilbert,* 73 Md. 66, 20 Atl. 434; *Dorsey* v. *Brigham,* 177 Ill. 250, 69 Am. St. Rep. 228, 52 N. E. 303, 42 L. R. A. 809.)

It is mandatory to place the cross opposite the name of the candidate for whom the voter intends to vote. (*Lay* v. *Parsons,* 104 Cal. 661, 38 Pac. 447.) Making a cross wholly outside the proper square invalidates the ballot. (*Parker* v. *Orr,* 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227; *Bechtel* v. *Albin,* 134 Ind. 193, 33 N. E. 967; *Sego* v. *Stoddard,* 136 Ind. 297, 36 N. E. 204, 22 L. R. A. 468; *Ogg* v. *Glover,* 72 Kan. 247, 83 Pac. 1039; *McCarthy* v. *Wilson,* 146 Cal. 323, 82 Pac. 243; *In re Hearst,* 48 Misc. Rep. 453, 96 N. Y. Supp. 119; *Rexroth* v. *Schein,* 206 Ill. 80, 69 N. E. 240.) Making a cross in the blank space between columns of two different tickets on the ballot invalidates

the ballot, even though it is made nearer to one name than another. (*Apple* v. *Barcroft*, 158 Ill. 649, 41 N. E. 1116; *State* v. *Sadler*, 25 Nev. 131, 83 Am. St. Rep. 573, 58 Pac. 292, 59 Pac. 546, 63 Pac. 128.) Where the "X" is made in the square before the blank space under a candidate's name, such mark cannot be counted as a vote for the candidate whose name appears above such blank space. This is even true where a small portion of the cross may be above the line. (*People* v. *Town*, 106 Cal. 500, 39 Pac. 937; *In re Ballot Marks*, 18 R. I. 822, 27 Atl. 608; *Strosnider* v. *Turner* (Nev.), 93 Pac. 502; *Smith* v. *Reid*, 223 Ill. 493, 79 N. E. 148; *Flanders* v. *Roberts*, 182 Mass. 524, 65 N. E. 902; *O'Connell* v. *Mathews*, 177 Mass. 518, 59 N. E. 195; *In re Flynn's Contested Election*, 181 Pa. St. 457, 37 Atl. 523; *Hughes* v. *Upson*, 84 Minn. 85, 86 N. W. 782; *Morrison* v. *Pepperman*, 112 Iowa, 471, 84 N. W. 522; *State* v. *Peter*, 21 Wash. 243, 57 Pac. 814; *Voorhees* v. *Arnold*, 108 Iowa, 77, 78 N. W. 797.) Where the "X" was made in the circle at the head of the Republican and Prohibition tickets, and there was no candidate for the office in question on the latter ticket, it was held that such ballot could not be counted as a vote for the Republican candidate for that office. (*McMahon* v. *Polk*, 10 S. D. 296, 73 N. W. 79, 47 L. R. A. 830; *Hope* v. *Flentge*, 140 Mo. 390, 41 S. W. 1006, 47 L. R. A. 806.) Where a voter endeavors to express his intention by making any other mark than an "X," the ballot should not be counted. (*Ellis* v. *Glaser*, 102 Mich. 405, 61 N. W. 648; *In re Vote Marks*, 17 R. I. 812, 21 Atl. 962; *Brewster* v. *Sherman*, 195 Mass. 222, 80 N. E. 821; *Kelley* v. *State*, 79 Miss. 168, 30 South. 49; *Christopherson* v. *Common Council*, 117 Mich. 125, 75 N. W. 445.) Mutilated ballots or ballots with part of the names of candidates torn off are void. (*Phelan* v. *Walsh*, 62 Conn. 260, 25 Atl. 1; 17 L. R. A. 364.) Pencil erasures of candidates' names, or pencil marks over candidates' names, may not be counted as a vote for the candidates whose names are not erased, neither may it be counted as a vote for any candidate. (*Apple*

v. *Barcroft, supra; McKittrick* v. *Pardee,* 8 S. D. 39, 65 N. W. 23.)

The failure of a judge to tear off the stub containing the number of the ballot makes the ballot void. This no more subjects the elector to loss of his vote because of an act of the election officer than the failure of such officer to stamp the ballot. (*Berryman* v. *Megginson,* 229 Ill. 238, 82 N. E. 256; *Choisser* v. *York,* 211 Ill. 56, 71 N. E. 940; *People* v. *Board of County Canvassers etc.,* 129 N. Y. 395, 29 N. E. 327, 14 L. R. A. 624.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

At the general election held in November, 1908, Lorin T. Jones was the Republican candidate, and Nat. G. Carwile the Democratic candidate, for the office of clerk of the district court of Yellowstone county. The votes were counted, returned and canvassed, and from the canvass it appeared that Jones had received 1,584 votes, and Carwile 1,574 votes. A certificate of election was thereupon issued to Jones, and Carwile contested the election. Upon the trial of the contest the district court found that Carwile had received 1,577 votes, while Jones had received 1,575 votes. From the judgment declaring Carwile elected, and annulling the certificate issued to Jones, the defendant Jones has appealed. Under the provisions of the Act of the Tenth Legislative Assembly, approved February 25, 1907 (Laws 1907, p. 66), the exceptions of each party are presented for review.

1. *Plaintiff's Exhibits 4, 5, 9, 10, 12, and Defendant's Exhibit L.* The plaintiff predicates error upon the ruling of the trial court in refusing to count for him each of six ballots. In three of these (Exhibits 4, 5, and 9) the cross is placed after the name of Carwile, and entirely without the Democratic column. In Exhibit 10 perpendicular lines are drawn through the names in the Republican column, but there is not any cross placed before the name of Carwile. In Exhibit 12 the name of Carwile is written in the Socialist column, but there is not any

cross placed before the name. And in Exhibit L there is a cross in every square in the Republican and Socialist columns, and lines drawn through the names in the Prohibition and Independence columns, but there is not any cross in the square before Carwile's name. We think the court did not err in its rulings. Section 552, Revised Codes, provides that the elector "shall prepare his ballot by marking an 'X' in the square before the name of the person or persons for whom he intends to vote. * * * The elector may write in the blank spaces * * * the name of any person for whom he wishes to vote, and vote for such person by marking an 'X' before such name." Assuming that a substantial compliance with the provisions of this section is all that is required, these ballots were properly excluded. There was not a substantial compliance, or any compliance at all, with the statute. (*McKittrick* v. *Pardee*, 8 S. D. 39, 65 N. W. 23.)

2. *Defendant's Exhibit Z-1.* For the same reason defendant's Exhibit Z-1 was properly excluded. The cross was placed to the right of Jones' name and without the Republican column.

3. *Defendant's Exhibits H, T, U, Z-2.* Error is predicated upon the refusal of the trial court to count for Jones each of four ballots, marked substantially as follows:

	Republican.
	Jones
X	

	Democratic.
	Carwile

	Socialist.

We think the court's ruling correct. The Political Code of 1895, in section 1361, made provision for voting a straight party ticket, and also provided that an elector might vote a mixed ticket by placing "a cross *opposite the name* of every candidate," etc., for whom he intended to vote. This section was amended in 1901 (Laws 1901, p. 117) by abolishing the circle at the head of the party column, and by providing that the elector "shall prepare his ballot by marking an 'X' *before the name* of the person or persons for whom he intends to vote." The section as thus amended was further amended in 1907

(Laws 1907, p. 210) by providing that the elector "shall prepare his ballot by marking an 'X' *in the square before the name* of the person or persons for whom he intends to vote." We must assume that the legislature had some purpose in view in thus restricting the elector as to the manner in which he should express his intention. Similar statutes prevail in many of the states, and the courts are quite uniform in holding that, to constitute a substantial compliance with the law, at least the point of intersection of the two lines forming the cross must be *within the square before the candidate's name.* (*Parker* v. *Orr*, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227; *In re Hearst*, 48 Misc. Rep. 453, 96 N. Y. Supp. 119; *Rexroth* v. *Schein*, 206 Ill. 80, 69 N. E. 240; *McKittrick* v. *Pardee, supra;* 9 Current Law, 1050; *Smith* v. *Reid*, 223 Ill. 493, 79 N. E. 148.) The ballots now under consideration disclose that the cross is not in the square before the name of Jones, but is in the square before the blank space, left there in order that the elector might write in the name of some person for whom he desired to vote. As there was not any name written in this blank space, the elector failed to vote for anyone for the office of clerk of the district court. (*In re Ballot Marks*, 18 R. I. 822, 27 Atl. 608.)

4. *Defendant's Exhibit V.* The court also refused to count for Jones a ballot marked by crossing out all the names in the Democratic and Socialist columns, and on which there was not any cross in the square before the name of Jones. For the reasons given above this ruling of the trial court was correct. While the intention of the voter is generally a very material consideration, still, in order to have his ballot counted, he must express his intention substantially as indicated by the statute. (*McKittrick* v. *Pardee, supra.*) In *Dickerman* v. *Gelsthorpe*, 19 Mont. 249, 47 Pac. 999, this court said: "The distinctive feature of the Australian ballot system is the use of the mark in connection with the names of the candidates and questions to be voted on; and, of course, unless the mark is employed to indicate the choice of the voter in his ballot, the ballot he casts is a nullity, however clearly that choice may otherwise be expressed."

5. *Plaintiff's Exhibit 8.* Defendant assigns error in the ruling of the trial court in counting for plaintiff a ballot upon the outside of which is the following indorsement: "Voted by C. H. Heron and J. F. McKeon for illegibility of voter." The objection made to the ballot is that the reason given for assisting the voter is not one recognized by law. But the statute does not require the judges of election to certify the reason for assisting a voter, and the words "for illegibility of voter" may be disregarded as surplusage, and the objection upon the ground urged was properly overruled. If the defendant desired to show for what reason the voter was assisted, he should have called one or both of the judges of election to testify. There is not any objection that the certificate indorsed is not in compliance with the provisions of section 555 of the Revised Codes, nor that it is not shown that Heron and McKeon were judges of election in the precinct where the ballot was cast. The objection proceeds upon the assumption that these men were judges of election; and, since it is not made to appear for what reason they assisted the voter, if they did so, we must assume that they regularly performed their official duty. It is suggested in the brief of respondent that by the word "illegibility" was meant "illiteracy," and, if this fact had appeared, we think the ballot should not have been counted; for it appears that the amendment to section 1364, Political Code, attempted to be made in 1901 (Laws 1901, p. 117), was not properly adopted, and that inability on the part of the elector to read or write is not any reason for his receiving the assistance of the election judges. But this question was not squarely before the district court, and need not receive further consideration.

6. *Defendant's Exhibits I, F, Y.* The court counted for Jones three ballots, in each of which the cross mark is placed after Jones' name, but within the Republican column. In each of these instances we think the court erred. It cannot be said that the voter substantially complied with the law which requires him to place the cross "*in the square before the name.*" This is the holding of the courts generally in construing stat-

utes similar to our own. (*McKittrick* v. *Pardee, above; Black* v. *Pate,* 130 Ala. 514, 30 South. 434.)

7. *Defendant's Exhibit J.* The court counted for Jones a ballot marked substantially as follows:

There is in fact a crossing of two lines within the square before the name of Jones. An examination of the entire ballot discloses that in most instances the elector made fairly good cross marks, but in nearly every instance there is manifest the difficulty under which the voter labored. His pencil marks are retraced, additional lines are made, the figures are crude, and the entire ballot shows that he was embarrassed by age, infirmity, insufficient light in the booth, or unfamiliarity with the use of a pencil. We do not think the legislature ever meant to require that a perfect letter "X," inclosed in quotation marks, should be the only means by which an elector can express his choice. Any mark which can be said to be a cross mark will answer. In the absence of anything to indicate a purpose on the part of the elector to identify his ballot by the use of a third line within the square, this defect ought not to vitiate the ballot. In *Parker* v. *Orr, above,* similar defects are illustrated in the opinion of the court, and they are there held not to render the ballot invalid. (See, also, 7 Current Law, 1245.) There was not any error in the trial court's ruling.

8. *Defendant's Exhibit L.* The court counted for Jones the ballot, defendant's Exhibit L above, and this action is claimed to be erroneous. As said above, a cross is placed before the name of every candidate in the Republican and Socialist columns, and the names in the Prohibition and Independence columns are crossed out by various marks. In our judgment, this ballot falls within the class mentioned in section 575, Revised Codes. That section provides that "any ballot * * * from which it is impossible to determine the elector's choice is void and must not be counted." The mere fact that the Socialists did not have any candidate for clerk of the district court does not militate against this position. We think the court

erred in counting this ballot for Jones. (*McMahon* v. *Polk*, 10 S. D. 296, 73 N. W. 79, 47 L. R. A. 830; *Hope* v. *Flentge*, 140 Mo. 390, 41 S. W. 1002, 47 L. R. A. 806.)

9. *Defendant's Exhibit M.* The court refused to count for Jones a ballot, perfect in form, and upon which the voter indicated his preference for Jones for clerk of the court, but from the ballot the stub is not detached, and since the stub bears the number corresponding to the number of a particular voter in precinct 14, of course the identity of the voter could be ascertained. But we think the court erred in disfranchising this voter for the failure, on the part of the election officer, to do his duty. It is a rule of well-nigh universal application "that one entitled to vote shall not be deprived of his privilege by action of the authorities." (Cooley's Constitutional Limitations, 775; *Lane* v. *Bailey*, 29 Mont. 548, 75 Pac. 191; McCrary on Elections, p. 144.) In *Farnham* v. *Boland*, 134 Cal. 151, 66 Pac. 200, the court said: "It is claimed that the trial court should have rejected ballots which had the stub attached to them—a stub that should have remained in the book from which the ballots were taken. We hold that these ballots were properly counted, and likewise those were properly counted which the officers of election placed in the ballot-box without first tearing therefrom the numbers attached. It is quite apparent that these violations of the law arose from the carelessness of the election officers. Such carelessness or malconduct upon the part of those officers may render them liable to severe penalties, but that is all. The law as to identifying marks refers to marks made by the voter, and it is only marks made by him that demand the rejection of the ballot. After citing many cases to the point this court said, in *People* v. *Prewett*, 124 Cal. 7, 56 Pac. 621: 'The principle underlying these decisions is that the rights of the voters should not be prejudiced by the errors or wrongful acts of the officers of election, unless it shall appear that a fair election and an honest count were thereby prevented.'" (See, also, *Bates* v. *Crumbaugh*, 114 Ky. 447, 71 S. W. 75; *Lynip* v. *Buckner*, 22 Nev. 426, 41 Pac. 762, 30 L. R. A. 354; *Moyer* v. *Van De Vanter*, 12 Wash. 377, 50 Am. St. Rep.

900, 41 Pac. 60, 29 L. R. A. 670.) Section 552, Revised Codes, makes it the duty of the ballot judge to remove the stub, and, in the absence of any showing of a corrupt or unlawful purpose, it will be presumed that this omission was the result of accident or inadvertence; but in any event, neither Jones nor the voter should be made to suffer for the misconduct or mistake of an election officer, where, as in this case, there is not any showing that either participated in, or was at all responsible for, the error.

10. *Defendant's Exhibits K-1 and K-2.* In precinct No. 13 there was found in the ballot-box a ballot badly torn, so that there are two separate portions of the ballot, and there is missing, from near the middle, a portion containing the names of two candidates in each party column. The portion bearing the names of Jones and Carwile does not bear the official stamp; and, although the ballot was marked as for Jones, the trial court refused to count it for him. In this we think the court erred. Of course, if the ballot was mutilated by the voter, it ought not to be counted; for provision is made in the statute for supplying a voter with a new ballot in the event he has mutilated the one first delivered to him. But there is not anything here to indicate that this ballot was torn by the voter. In the absence of such showing the presumption is always in favor of the voter, and it would be presumed that the ballot was torn after it left the voter's hands. This is the general rule. But in this instance we are not left to rely upon presumptions. When the two portions of the ballot are folded together, as they were by the voter, the evidence is so convincing as to be said to amount to a demonstration that the ballot was torn by the ballot judge in detaching the stub, and for this the elector cannot be made to suffer.

11. *Residence.* From the total vote returned in favor of Jones the trial court deducted 4, on account of ballots cast for Jones in Broadview precinct by former residents of Iowa: Waterman, Leonard, Claude Barkhuff, and William Barkhuff. George A. Waterman came from Iowa to Yellowstone county in July, 1907, and engaged in the real estate business, and in

the business of locating homeseekers in Yellowstone county. At that time he selected a homestead, but, when he went to the land office to make his filing, ascertained that he already owned too much land to be allowed to make the filing. He testified that he determined to make his home in Yellowstone county in July, 1907, and, when away, intended to return there, and that since July, 1907, he had considered Yellowstone county his home. His business in locating homeseekers kept him traveling between Montana and Iowa much of the time, and while in Montana he had no fixed place of abode other than the hotel where he stopped. He filed on a homestead in April, 1908, and about the same time brought his family from Iowa, and settled in Broadview precinct. George Leonard came from Iowa to Montana in August, 1907, and at that time selected and filed upon a homestead. He says he came to look at the country, and when he selected his homestead he formed his intention to make it his home, and retained such intention thereafter. He returned to Iowa to arrange his affairs to return to this state, but without any intention of remaining in Iowa, and with a fixed purpose to return to Montana and make it his permanent and fixed place of residence. In the spring of 1908 he removed his family from Iowa onto his homestead in Broadview precinct, and resided there afterward. Claude and William Barkhuff came from Iowa to Montana in October, 1907, and each selected and filed upon a homestead. Each soon after returned to Iowa to arrange his affairs to return to Montana to make it his home, and without any intention of remaining in Iowa. From the date of making his homestead filing each had intended his homestead to be, and each had considered it as, his home—the place to which he intended to return when away. Each brought his family to Montana in the spring of 1908, and each then settled upon his respective homestead in Broadview precinct, and has resided there since. None of these men made any improvements upon his homestead until after the first of the year 1908, and none of them voted in Iowa while there, between the fall of 1907 and the spring of 1908.

In attempting to define the term "residence," as used in election laws generally, the courts and text-writers have encountered great difficulty, and it may be said that there is not any definition which has been formulated that will apply to the facts of every case. From the decided cases certain rules may be gathered which are intended to aid in applying the law to the facts of a particular case. In this state those rules are crystallized into a statute—section 481, Revised Codes. But even those rules are so very general in their terms that they afford very little assistance. In other words, it is as easy to understand the meaning of "residence" as it is to understand the meaning of some of the terms used in the rules for determining the meaning of "residence." Every case must stand upon its own facts, and a decision in any event must, of necessity, be the result of a more or less arbitrary application of the rules of law to the facts presented.

In view of the facts appearing that the family of each of these men remained in Iowa until after November, 1907, we must start our inquiry by the application of rule 8 of section 481 above: "The place where a man's family resides is presumed to be his place of residence." This is in reality a rule of evidence; and, when the plaintiff showed that the family of each of these four men remained in Iowa until after November, 1907, he made out a *prima facie* case against the right of each to vote, and the burden was cast upon the defendant to show a state of facts which brought the men within the definition of a legal voter of Montana. We may derive assistance, in attempting to solve this problem, by reversing the case somewhat, and assume that these men, having done the things which they did in Montana in the summer of 1907, had, upon their return to Iowa, sought to vote there. Would they have been held to be legal voters there? We think not. And we think our answer is the correct interpretation of the court's decision in *Vanderpoel* v. *O'Hanlon,* 53 Iowa, 246, 36 Am. Rep. 216, 5 N. W. 119. At the time that case was decided Iowa does not seem to have had a statute similar to our rule 2 of section 481 above, and the fact that the plaintiff was a student attending college was not

a factor in the decision. The case was decided upon principles of law applicable to voters generally. The plaintiff's family resided in Mitchell county. Plaintiff went to Johnson county to attend the Iowa State University, and was there for three years. In 1878 he returned to Mitchell county, and offered to vote. His vote was challenged, and the case resulted. The court announced these two general rules: (1) A residence once gained continues until another is acquired; and (2) when a new residence is acquired, the old one is lost. The court also said: "If it was the intention of the plaintiff to return to Mitchell county when he had finished his education, it would probably be conceded that his place of residence, within the meaning of the Constitution, continued to be in Mitchell county during all the time he was absent. And, on the other hand, it would probably be admitted, if, when he went to Iowa City, or at any time thereafter before he offered to vote, his intention was to make that place his home and residence when he ceased to attend the University, that such place was and became his place of residence in such sense that he would have become a legal voter in Johnson county." Applying the decision in that case to the facts relating to these four men, and the conclusion would seem inevitable that, if they intended to return to Iowa from Montana to make Iowa their home, their residence in Iowa would be held to continue during the entire period of their absence therefrom. If, on the other hand, when they came to Montana, *or while here,* they intended to make Montana their home and residence, then Montana became and was their place of residence, in the sense of that term as used in the election laws. If, then, these men lost their residence in Iowa by reason of the facts related, it follows that they gained one in Montana; for it is a rule, recognized practically everywhere, that a residence cannot be lost until another is gained. (Rule 9, sec. 481, above.)

A case somewhat similar to this is presented in *State ex rel. Smith* v. *Deniston,* 46 Kan. 359, 26 Pac. 742. Stringer, who had been a resident elector in Kansas, went to Oklahoma, and on June 8, 1889, filed on a homestead claim, broke some ground,

and put in a small crop. He testified that from the time he made his homestead filing, he intended to make Oklahoma his home and raise his family there. He went back to his former place of residence in Kansas to see his family, who still remained there, and, while there, voted on November 5, 1889. Two days later he left for Oklahoma. His family followed him shortly afterward, and all resided in Oklahoma since that time. Upon this state of facts the Kansas court held that he had lost his legal residence in Kansas, and was not qualified to vote there. The only difference between Stringer's case and the case of Leonard and the two Barkhuffs is that Stringer plowed some ground and planted a small crop on his homestead. But neither of these is a determining factor. Each tends to give emphasis to Stringer's purpose to make Oklahoma his home; but the determining factors were his selection of a new home, coupled with his intention to make that place his home.

Rule 9 of section 481 further provides: "A change of residence can only be made by the act or removal joined with the intent to remain in another place." While the word "or" appears in the Code, the word "of" is evidently intended. The inquiry immediately arises: When did these men remove from Iowa to Montana? Our judgment, based upon reason and the adjudications, is that their coming to Montana in the summer of 1907, coupled with the selection of new homes here, constituted the removal mentioned in the statute. The word "removal" means the act of making a change in place; and, as applied to these men, it means the act of changing their former homes in Iowa to their new homes in Montana. Waterman did not file on a homestead in 1907, but he did engage in business in Yellowstone county, and formed the intention of making that county his home.

After all, in prescribing the one year's residence as a qualification for the voter, our Constitution and statutes look to two primary objects, (1) familiarizing the elector with the conditions and needs of his new home, and with the qualifications of candidates; and (2) preventing the colonization of illegal voters.

In the view we have taken there does not appear from this record to have been any error in the conclusion of the trial court that Carwile received 1,577 legal votes; but, from the 1,575 votes counted for Jones, there should be deducted 4, represented by defendant's Exhibits I, F, Y, and L, leaving 1,571, and to this should be added 6, represented by the torn ballot, the ballot from which the stub was not detached, and the votes of Waterman, Leonard, and the two Barkhuffs, thus giving to Jones also a total of 1,577 legal votes, and resulting in a tie vote, or a failure on the part of the electors of Yellowstone county to choose a clerk of the district court.

The judgment is reversed and the cause is remanded to the district court, with directions to vacate the judgment entered, and to enter a judgment according to the facts and conclusions herein announced. Each party will pay his own costs.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE SMITH: I concur in all that is said in the foregoing opinion, with this exception: I believe that the district court was correct in counting the ballot marked "Exhibit L," for Mr. Jones. The voter complied literally with the statute in marking this ballot; he marked an "X" in the square before the name of Mr. Jones. This vote for Jones was not nullified or offset by the "X" placed before the blank space in the Socialist column, because that party had no candidate for the office of clerk of the district court. My opinion is that, when the voter complies literally with the statute, as a matter of law his vote is thereby cast, and the court has no power to examine the remainder of the ballot for the purpose of finding out what his intention may have been, or to inquire into his intention at all. (See *People* v. *Seaman*, 5 Denio (N. Y.), 409-412, *Beardstown* v. *Virginia*, 76 Ill. 34-48, and *People* v. *Saxton*, 22 N. Y. 309, 78 Am. Dec. 191.) To me it seems a corollary of the principle upon which Exhibits H, T, U, and Z-2 are rejected that Exhibit L should be counted. Those exhibits bear palpable

evidence that the persons casting them intended to vote for Jones, but that intention may not be given effect because the "X" is not in the square; consequently Exhibit L should be counted for Jones without further examination, for the reason that the "X" is in the square. I can see no escape from this conclusion.

I think, therefore, that the judgment of the district court should be reversed and the cause remanded, with instructions to enter judgment declaring the appellant to be entitled to the office in question.

Rehearing denied May 6, 1909.

MEMORANDA

OF

DECISIONS RENDERED WITHOUT WRITTEN OPINIONS DURING THE PERIOD EMBRACED IN THIS VOLUME.

No. 2,566.—DAVID V. WILSON, APPELLANT, *v.* DORA WEIGERT, RESPONDENT.

Appeal from District Court, Missoula County; F. C. Webster, Judge.

On motion to dismiss appeal.

Decided December 3, 1908.

PER CURIAM.—It is this day ordered that the appeal herein be, and the same is hereby, dismissed in accordance with motion of appellant.

Messrs. Woody & Woody, and *Messrs. Marshall & Stiff,* for Appellant.

No. 2,653.—STATE EX REL. WM. JOHNS ET AL., RELATORS, *v.* THE CITY OF BUTTE, RESPONDENT.

Decided December 8, 1908.

PER CURIAM.—Relators' petition for permission to file a complaint herein in the nature of a *quo warranto* proceeding, submitted on December 3, 1908, is hereby denied.

Mr. Albert J. Galen, and *Mr. J. J. McCaffery,* for Relators.

No. 2,606.—NEW YORK LIFE INSURANCE CO., APPELLANT, *v.* E. J. NADEAU, COUNTY TREASURER, RESPONDENT.

Appeal from District Court, Deer Lodge County; Geo. B. Winston, Judge.

On motion to dismiss appeal.

Decided December 15, 1908.

PER CURIAM.—Respondent's motion to dismiss the appeal herein is, after due consideration, sustained and the appeal accordingly dismissed.

Mr. Jas. A. McIntosh, and *Mr. R. L. Clinton,* for Appellant.

Mr. John W. Jones, for Respondent.

No. 2,661.—STATE EX REL. J. J. SULLIVAN, RELATOR, *v.* DISTRICT COURT ET AL., RESPONDENTS.

APPLICATION for writ of supervisory control against the District Court of the Second Judicial District, and Geo. M. Bourquin, a Judge thereof.

Decided December 18, 1908.

PER CURIAM.—Relator's petition for a writ of supervisory control herein, heretofore submitted, is hereby denied.

Mr. T. F. Nolan, for Relator.

No. 2,260.—IN RE APPLICATION OF B. S. THRESHER FOR REINSTATEMENT TO THE BAR.

Decided January 30, 1909.

PER CURIAM.—Whereas, B. S. Thresher having heretofore applied for reinstatement to the bar of this state, and whereas, the court having been fully advised as to his actions and conduct since his disbarment: It is ordered that the said B. S. Thresher be, and he is hereby, reinstated upon his taking the usual oath of office, as an attorney and counselor at law. (MR. CHIEF JUSTICE BRANTLY dissenting.)

No. 2,585.—HELENA CAB CO., APPELLANT, *v.* JACOB FISHER ET AL., RESPONDENTS.

Appeal from District Court, Lewis & Clark County; Thomas C. Bach, Judge.

On motion to dismiss appeal.

Decided February 1, 1909.

PER CURIAM.—It is hereby ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed in accordance with stipulation of counsel.

Mr. E. A. Carleton, for Appellant.

Mr. O. W. McConnell, for Respondents.

No. 2,670.—STATE EX REL. NICHOLAS HUGHES, RELATOR, *v.* DISTRICT COURT ET AL., RESPONDENTS.

ORIGINAL application for writ of prohibition against the District Court of Yellowstone County, and Sidney Fox, Judge thereof.

Decided February 6, 1909.

PER CURIAM.—This cause having been set for hearing this day, respondents appearing by counsel and assenting to the issuance of the writ prayed for, it is ordered that a peremptory writ of prohibition issue at the cost of respondents.

Mr. J. E. Healy, for Relator.

Mr. Chas. A. Taylor, for Respondents.

No. 2,683.—C. P. TOOLEY, RESPONDENT, *v.* JACOB ELSTOM, EXECUTOR, APPELLANT.

Appeal from District Court, Meagher County; E. K. Cheadle, Judge.

On motion to dismiss appeal.

Decided February 25, 1909.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed in accordance with motion of respondent on file herein.

Mr. N. B. Smith, and *Mr. E. P. Heywood,* for Appellant.

Mr. E. M. Hall, and *Mr. W. L. Ford,* for Respondent.

No. 2,633.—KATE H. McCORMICK, APPELLANT, *v.* EDWARD SCHARNIKOW, EXECUTOR, ETC., RESPONDENT.

Appeal from District Court, Missoula County; Welling Napton, Judge pro tempore.

On motion to dismiss appeal.

Decided March 13, 1909.

PER CURIAM.—Appellant having failed to file her brief herein within the time allowed by law, her appeal is, on motion of respondent, dismissed.

Mr. Wm. Wallace, Jr., and *Messrs. Marshall & Stiff*, for Appellant.

Messrs. Hall & Patterson, for Respondent.

No. 2,700.—STATE EX REL. WM. CLANCY, RELATOR, *v.* DISTRICT COURT, RESPONDENT.

APPLICATION for writ of supervisory control directed to the District Court of Silver Bow County.

Decided March 25, 1909.

PER CURIAM.—The relator's petition for a writ of supervisory control herein is hereby denied.

Mr. Jas. H. Baldwin, for Relator.

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ACCOUNT STATED.

What Constitutes.

1. The result of an ascertainment of a balance due one of two parties, and its discharge by payment, was an account stated.—Johnson v. Gallatin Valley Milling Co., 83.

Estoppel—Presumptions.

2. A settlement of accounts between two parties does not create an estoppel, but furnishes a strong *prima facie* presumption that the result thus reached is correct.—Johnson v. Gallatin Valley Milling Co., 83.

Reopening—Complaint—Burden of Proof.

3. One who seeks to avoid a settlement of accounts, the result of which was an account stated, and open up to investigation the antecedent dealings between the parties, must allege the error, fraud or mistake on which he relies, and the burden of establishing such allegation by clear and satisfactory evidence is upon him.—Johnson v. Gallatin Valley Milling Co., 83.

Same—Knowledge of Error or Mistake at Time of Settlement—Effect.

4. If, at the time of stating an account and making a settlement, the party who thereafter seeks to avoid it knew of the error, mistake or fraud upon which he relies, or, with ample means of knowledge at hand, failed to take advantage of such means of knowledge, the account will not be reopened except upon proof of fraud or imposition.—Johnson v. Gallatin Valley Milling Co., 83.

Same—Evidence—Review.

5. Evidence examined, and *held*, that plaintiff, who sought to surcharge an account stated, failed to meet the burden of proving error or mistake in the settlement of the account.—Johnson v. Gallatin Valley Milling Co., 83.

Error or Mistake—Waiver

6. Where plaintiff, having delivered a large quantity of grain to defendant milling company, agreed to a settlement of accounts between himself and defendant, and receipted the account with full knowledge that he had reason to believe that owing to an alleged defect in defendant's scales the latter received more grain than the scales indicated, and there was not any evidence that he had been misled by defendant's agent, he will be held to have waived any claim to a reopening of the account on the ground of error or mistake.—Johnson v. Gallatin Valley Milling Co., 83.

ACTIONS.

Action *in Personam*—Definition.

1. A proceeding *in personam* is one, in form as well as in substance, between parties claiming the right, and the judgment binds the judgment debtor and those in privity with him, to some sort of personal liability; in the execution of the decree the debtor is an active factor.—Gassert v. Strong et al., 18.

Action *in Rem*—Definition.

2. A proceeding *in rem* is one to determine the state or condition of the thing itself, and the judgment binds all the world.—Gassert v. Strong et al., 18.

Action *Quasi in Rem*—Definition.

3. An action *quasi in rem* is one which, while brought against a person, seeks only to subject his property to the discharge of the claim asserted, and a judgment in such an action is only conclusive between the parties.—Gassert v. Strong et al., 18.

ADMINISTRATORS.

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AFFIDAVITS.

Disqualifying district judges,—see District Courts, 1, 2.

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See Principal and Agent.

AMENDMENTS.

Statute of Limitations—"Commencement" of Action—Demurrer—Relation Back to Original Pleading.

1. An action is "commenced" within the meaning of section 6457, Revised Codes, and the operation of the statute of limitations is thereby arrested, by filing a complaint to which a general demurrer is afterward sustained, provided the pleading is sufficiently substantial to allow of its being properly amended so as to fully state the same cause of action attempted to be stated in the first instance.—Clark v. Oregon Short Line R. R. Co., 177.

Bill of Exceptions—Amendments After Appeal—Power of District Court.

2. While the district court has power to amend its records so as to speak the truth, its authority in this regard does not extend to the amendment of an order after it has lost jurisdiction by the taking of an appeal from it; hence an order amending a certificate to a bill of exceptions, erroneously therein designated a statement on motion for a new trial, so as to give it its proper title, which order was made pending appeal, was error.—Robinson v. Helena L. & Ry. Co., 222.

Pleadings—Mines—Adverse Suits—Discretion.

3. Plaintiffs' location was made in 1905, that of defendant in 1906. At the trial of an adverse suit, in 1908, defendant asked leave to file a supplemental answer, alleging that plaintiffs had neglected to do the representation work on the claim in controversy, for the year 1907. The court refused permission to file it. *Held*, that it not appearing that defendant claimed to have initiated any rights subsequent to 1906, and his brief on appeal not disclosing any argument as to the materiality of the evidence sought to be introduced under the supplemental answer, there was no abuse of discretion in the court's action.—Nichols et al. v. Williams, 552.

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Briefs—Specifications of Error.

1. Where an error relied upon for reversal was clearly set forth in appellant's brief in a paragraph by itself, it was sufficient, even though

it was not set out in appellant's specifications of error.—Gehlert v. Quinn, 1.

Appeal from Judgment—Lapse of Time—Dismissal.

2. An appeal from a judgment not taken within one year from the date of its entry will be dismissed.—Kaufman v. Cooper et al., 6.

Undertakings—Sufficiency.

3. An undertaking on appeal from a judgment and an order denying a new trial, in the form of that held sufficient in *Watkins* v. *Morris*, 14 Mont. 354 (to-wit, omitting the alternative condition referring to each), sustains both appeals if properly taken; hence it is sufficient to sustain the appeal from the order, where that from the judgment is dismissed because not taken in time.—Kaufman v. Cooper et al., 6.

Review—Conflicting Evidence—New Trial.

4. Where the finding of the jury is based on irreconcilably conflicting evidence, it and the judgment of the trial court in denying a motion for a new trial, upon a review of the evidence, will not be disturbed on appeal.—Kaufman v. Cooper et al., 6.

Undertaking—Sufficiency.

5. An undertaking on appeal, in an action in which the judgment was amended after entry, which recited that the appeal was from "the judgment and amended judgment" and an order denying a new trial, showed on its face that the appeal was from but one judgment, to-wit, the amended judgment, and the order. The original judgment had become *functus officio* by the amendment, and reference to it was surplusage; hence one undertaking was sufficient to support the appeals.—Gassert v. Strong et al., 18.

Same—Defect—How Cured.

6. An undertaking on appeal which is defective, but not void, may be cured by filing a new undertaking.—Gassert v. Strong et al., 18.

Equity Cases—Findings—Review.

7. In equity cases it is incumbent upon appellant to show that the evidence preponderates against the findings of the trial court; if he is unable to do so, the supreme court will not interfere.—Gassert v. Strong et al., 18.

Criminal Law—Verdict—Evidence—Sufficiency.

8. A verdict of conviction of a public offense will not be disturbed on appeal where the evidence, though conflicting, is sufficient to sustain it.—State v. Conway, 42.

Evidence—Striking Out—Error.

9. In answer to a question how an opening on a porch into which a domestic servant fell was situated, defendant answered that it was at the end of the porch, and that it was not necessary for a person going over the porch for a certain purpose to go near it. *Held*, that it was error to strike out the latter clause of the answer as not responsive to the question, it having been a natural explanation of the preceding portion thereof.—Fearon v. Mullins, 45.

Exclusion of Evidence—When Harmless Error.

10. Error in striking out a part of an answer as not responsive was not prejudicial, where evidence of the same facts was afterward admitted without objection.—Fearon v. Mullins, 45.

View of Premises by Jury—Verdict—Conclusiveness.

11. The evidence in the above action having been conflicting and the premises where the accident occurred viewed by the jury, they were the exclusive judges to determine the facts, and with their determination in favor of plaintiff and the court's action in denying a new trial, the supreme court will not interfere on appeal.—Fearon v. Mullins, 45.

Motions—Review.

12. Where a motion is made upon several grounds, and the order granting it is general in its terms, the order will be sustained on appeal if it can be upon any of the grounds of the motion.—In re Fleming's Estate, 57.

New Trial—Remission of Portion of Verdict—Presumptions.

13. In the absence of the evidence from the record, it will be presumed that the action of the court in ordering a new trial unless remission of all but $225 of a $3,600 judgment be agreed to by the successful party, was fully justified.—State ex rel. Cohn v. District Court et al., 119.

Same—Service of Notice—Deficiency in Law—Supervisory Control.

14. Appeals being only allowed under such regulations as may be prescribed by law (Constitution, Article VIII, section 15), and the law not having made provision for the appointment, temporarily, of some one upon whom service of notice of an appeal from an order granting a new trial could be made in place of an adverse party who had died after the order was made, the supreme court, on application for writ of supervisory control, looking to the annulment of the order, cannot grant relief. The deficiency in the law in this respect can be supplied only by legislative, not judicial, action.—State ex rel. Cohn v. District Court et al., 119.

Appeals from Justices' Courts—Record—Papers—Identification.

15. Copies of papers incorporated in the record on appeal to the supreme court, in an action brought to the district court from a justice's court, which are not identified by a bill of exceptions, nor even referred to by the clerk's certificate as correct copies, will, on motion, be stricken out.—Mettler v. Adamson et al., 198.

Same—Dismissal of Action—Final Decision—Exceptions.

16. An order of the district court sustaining a motion to dismiss an action appealed to it from a justice's court is a "final decision"; and as such it is deemed to have been excepted to. (Revised Codes, sec. 6784.)—Mettler v. Adamson et al., 198.

Record—Incorporation of Papers not Identified—Effect.

17. The fact that papers which could only be made a part of the record on appeal by bill of exceptions were merely copied into it without anything to identify them, did not destroy the character or identity of the record.—Mettler v. Adamson et al., 198.

Appeal from Justices' Courts—Record on Appeal to Supreme Court—How Made up.

18. The record on appeal to the supreme court in an action brought to the district court from a justice's court must be made up as in cases originating in the district court, and it is not necessary that the whole record be embodied in a bill of exceptions.—Mettler v. Adamson et al., 198.

Same—Jurisdiction of Appellate Court.

19. In an action appealed to the district court from a justice's court, the former has the same extent of jurisdiction as the latter had.—Mettler v. Adamson et al., 198.

Exclusion of Evidence—Curing Error.

20. Alleged error in sustaining an objection to a question asked on behalf of defendant was cured where the testimony sought to be elicited was immediately thereafter given by the same witness.—State v. De Hart, 211.

Bill of Exceptions—Certificate—Misnomer—Effect.

21. A bill of exceptions in support of a motion for a new trial was prepared in conformity with the requirements of the Act of 1907 (Laws

1907, p. 89), was entitled and served as such, and opposing counsel in acknowledging service designated it as a bill of exceptions, and after service, offered and had incorporated in it certain amendments. It was submitted to the judge as a bill of exceptions, and the certificate referred to the document as being "allowed, settled and signed as and for a true and correct copy of the proceedings of the trial," etc. In the certificate of settlement, however, counsel for movant designated the document as a "statement on motion for new trial." *Held*, that under the circumstances, the mere misnomer of the document was not sufficient ground for striking the bill from the record on appeal.—Robinson v. Helena L. & Ry. Co., 222.

Same—Amendments After Appeal—Power of District Court.

22. While the district court has power to amend its records so as to speak the truth, its authority in this regard does not extend to the amendment of an order after it has lost jurisdiction by the taking of an appeal from it; hence an order amending a certificate to a bill of exceptions, erroneously therein designated a statement on motion for new trial, so as to give it its proper title, which order was made pending appeal, was error.—Robinson v. Helena L. & Ry. Co., 222.

Variance—Question not Raised on Motion for New Trial—Effect.

23. A claim of variance between the pleadings and proof, which was not called to the trial court's attention on a motion for new trial, may not be urged for the first time on appeal as error in denying the motion. Robinson v. Helena L. & Ry. Co., 222.

Instructions—Review—Exceptions Necessary.

24. Error assigned to the giving of an instruction may not be reviewed on appeal where the record shows that counsel merely "objected" to its being given, but did not reserve an exception to the action of the court in overruling the objection, as required by section 6746, Revised Codes.—Robinson v. Helena L. & Ry. Co., 222.

Review—Bill of Exceptions.

25. Since the adoption of section 6746, Revised Codes (Laws 1907, p. 62), the whole charge, or such parts of it as will illustrate the point upon which the objecting party relies as error in the charge, as well as instructions requested and refused, should be incorporated in a bill of exceptions to insure review on appeal.—Robinson v. Helena L. & Ry. Co., 222.

Irregularities—Errors Within Jurisdiction—Review.

26. Where the district court had jurisdiction to make an order of sale of a decedent's real estate, and the order itself was not void, any defects in the proceedings leading up to the sale were errors within jurisdiction, subject to review on appeal in the probate proceedings only, and not open to collateral attack by heirs seeking to set aside the sale for errors which amounted only to irregularities in the proceedings, and which, under section 7625, Revised Codes, must be disregarded.—Plains Land & Investment Co. et al. v. Lynch et al., 271.

Criminal Law—Motion in Arrest of Judgment—Appeal does not Lie.

27. An appeal does not lie from an order overruling a motion in arrest of judgment. Such an order is reviewable only on appeal from the judgment.—State v. Brown, 309.

Same—Evidence—Exclusion—Harmless Error.

28. Error in excluding an offer of proof tending to show that the complaining witness in a prosecution for larceny by bailee had turned over to defendant less money than he claimed, was cured by the admission of testimony which included all the evidence in the offer.—State v. Brown, 309.

Personal Injuries—Earning Capacity—Lack of Evidence—Motion to Withdraw from Jury—Refusal—Harmless Error.

29. Where plaintiff failed to introduce evidence touching his loss of earning capacity, the denial of a motion to withdraw from the jury the question of damages sustained on that account, while error, was nonprejudicial, in view of an instruction, subsequently given, which accomplished the same purpose.—Montague v. Hanson, 376.

Same—Refusal of Instruction—Non-prejudicial Error.

30. The court having instructed the jury that defendant storekeeper was only bound to use ordinary care, and that, if they found that he had discharged the obligation resting upon him to warn plaintiff of the existence of an open cellarway into which he fell, they should find for defendant, its action in refusing to charge that the mere fact that the cellarway was open for the purpose of obtaining goods from the basement, did not constitute negligence *per se*, was not prejudicial error. While the instruction might well have been given, the jury must have understood that the mere existence of the trapdoor could not convict the defendant of negligence.—Montague v. Hanson, 376.

Conversion—Pleadings—Motion to Strike—Refusal—Harmless Error.

31. Error in refusing to grant a motion, in an action in conversion, to strike out a portion of the replication which, referring to proceedings on attachment had in a justice's court, were said to contain allegations argumentative in character and charging defendants with gross wrongdoing, was harmless, where during the trial the entire record of the proceedings had in the justice's court was on plaintiff's motion excluded, and where the court in its instructions submitted only the issues presented by the complaint and the denials in the answer.—Shandy v. McDonald et al., 393.

Same—Evidence—Admissibility—Harmless Error.

32. Where in an action in conversion the court charged the jury that, if they found for plaintiff, they should fix the value of two horses at the figure at which plaintiff bid them in at the judicial sale, together with interest, error in the admission of other evidence touching value was harmless.—Shandy v. McDonald et al., 393.

Same—Evidence—Review—Record.

33. Where the record of attachment proceedings had in a justice's court, offered in evidence in support of the justification pleaded in the answer to an action in conversion, was not incorporated in the bill of exceptions, the propriety of the court's ruling in excluding the evidence will not be reviewed on appeal.—Shandy v. McDonald et al., 393.

Record—Addition—Certified Copies.

34. After a transcript on appeal is filed in the supreme court, nothing may be added to it by such court in the shape of certified copies of papers at the request of the appellant. The review must be had upon the record as made in the district court.—Shandy v. McDonald et al., 393.

Undertakings on Appeal—When Nugatory—Meaningless Terms.

35. An undertaking in support of appeals from three orders made in a probate proceeding, which recited that the appellant would pay all damages and costs, etc., not exceeding the sum of $300, "otherwise the obligation to become null and void; otherwise to remain in full force and effect," was rendered nugatory because made meaningless by the insertion of the term "otherwise" in the two clauses quoted.—In re Kappler's Estate, 419.

Same—Insufficiency—Several Appeals.

36. The above undertaking was also objectionable because insufficient, the statute requiring an undertaking in the sum of $300 to effectuate each appeal, except where appeals are taken from a final judgment

and a new trial order at the same time, in which case one undertaking in the penal sum of $300 is sufficient.—In re Kappler's Estate, 419.

Same—Insufficiency—Reference to Penalty.

37. While only one undertaking need be filed in support of any number of appeals taken at the same time (Revised Codes, sec. 7107), the penalty in all cases, except on appeals from a final judgment and a new trial order, must be sufficient in amount to support all of them, and the different appeals must be referred to in such a way that the penalty may be properly apportioned, otherwise the undertaking will be insufficient for ambiguity.—In re Kappler's Estate, 419.

Evidence—Admission or Rejection—Briefs.

38. Where none of the evidence, to the admission or rejection of which exception had been taken, was recited in the brief of appellant, either in substance or otherwise, the assignment of error in this regard will not be considered on appeal. (Rule X, sec. 3, subd. *b*.)—Nichols et al. v. Williams, 552.

APPEALABLE ORDERS.

See Appeal and Error, 27.

ASSUMPTION OF RISK.

See Personal Injuries.

ATTACHMENT.

Sheriffs—Infirmity in Process—Effect.

1. Where a sheriff in levying upon property purported to act by virtue of a writ of attachment, infirmity in his process did not have the effect of changing his official status, i. e., he acted officially, notwithstanding such infirmity, and not individually.—Gehlert v. Quinn, 1.

ATTORNEYS.

Notice—Service by Mail—When Insufficient.

1. Service of a notice upon an attorney can be made through the mail, only in the event that his place of residence is not known; therefore, where the location of both the office and residence of an attorney was known to opposing counsel, their notice to him, through the mail, of the entry of a judgment, was insufficient.—State ex rel. Cohn v. District Court et al., 119.

Same—Defective Service—Not Cured by Actual Receipt of Notice.

2. Since the notice mentioned in the foregoing paragraph was not a legal notice, i. e., one served according to law, the actual receipt of the letter notifying the attorney upon whom service was thus sought to be made, of the entry of judgment, was not effective, and his notice of intention to move for a new trial, served and filed after the lapse of ten days from receipt of the letter, was timely.—State ex rel. Cohn v. District Court et al., 119.

Contempt Proceedings—Attorneys' Fees—Costs of Litigation—Not Recoverable.

3. *Held*, that, in the absence of statute on the subject, attorney's fees and other expenses incurred by the owner of a water right in instituting and prosecuting to a successful determination a contempt proceeding for the violation of a decree of court settling his rights, are not recoverable as items in an action against the contemnor for damages proximately caused by his disobedience of the order.—Dunlavey v. Doggett et al., 204.

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Specifications of Error—Sufficiency.

1. Where an error relied upon for reversal was clearly set forth in appellant's brief in a paragraph by itself, it was sufficient, even though it was not set out in appellant's specifications of error.—Gehlert v. Quinn, 1.

Assignments of Error—Failure to Argue—Rehearing.

2. Where counsel for appellant failed in their brief to argue assignments of error based upon the refusal of the court to give certain instructions, and merely stated therein that under the pleadings and facts in evidence they should have been given, thus leaving it to the supreme court to determine for itself from such examination wherein the trial court erred in refusing them, a petition for rehearing on the ground that in its decision the appellate court overlooked such assignments of error has no merit.—Kaufman v. Cooper et al., 16.

Evidence—Admission or Rejection.

3. Where none of the evidence, to the admission or rejection of which exception had been taken, was recited in the brief of appellant, either in substance or otherwise, the assignment of error in this regard will not be considered on appeal. (Rule X, sec. 3, subd. *b*.)—Nichols et al. v. Williams, 552.

BURDEN OF PROOF.

Trusts—Fraud.

1. In an action to have defendants declared trustees *ex maleficio* for plaintiff's benefit, for an alleged conspiracy to defraud the latter out of his property, the burden was upon defendants to show the *bona fides* of the transaction.—Gassert v. Strong et al., 18.

Trustee and *Cestui Que Trust*—Transactions Between.

2. Where, in addition to mortgages to secure indebtedness, absolute deeds to the property were delivered as further security, the relationship of trustee and *cestui que trust* arose between the debtor and creditor, and the burden was cast upon defendant in an action assailing the *bona fides* of the transaction, to show that, when the *cestui que trust* relinquished his rights to defendant, the transaction was fair, that an adequate consideration was paid, that there was no fraud or concealment, and that the *cestui que trust* acted with full information relative to the status of the property. The presumption is against the transaction.—Gassert v. Strong et al., 18.

Account Stated—Opening of.

3. One who seeks to avoid a settlement of accounts, the result of which was an account stated, and open up to investigation the antecedent dealings between the parties, must allege the error, fraud or mistake on which he relies, and the burden of establishing such allegation by clear and satisfactory evidence is upon him.—Johnson v. Gallatin Valley Milling Co., 83.

CARRIER AND PASSENGER.

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CERTIORARI.

New Trial Order—Jurisdiction.

1. *Certiorari* does not lie to review an order granting a new trial, where the district court had jurisdiction to hear the motion.—State ex rel Cohn v. District Court et al., 119.

CITIES AND TOWNS.

See Municipal Corporations.

CLAIM AND DELIVERY.

Pleadings—General Denial—Matters Admissible Under.

1. Since in claim and delivery, wherein plaintiff relies on general allegations of ownership and right of possession, a general denial puts in issue both the right of property and the right of possession, as well as all other material allegations of the complaint, and under it defendant may give in evidence any special matters which will defeat plaintiff's claim, the court did not err in permitting defendants, in an action wherein plaintiff sought to recover possession of a stock of merchandise theretofore delivered by him to another to be sold, with an option to purchase, and afterward by the latter placed in the hands of defendants under the same agreement, to abandon their special plea by which they claimed under a sale from their predecessor, and proceed under their general denial.—Kaufman v. Cooper et al., 6.

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Police Commission Act—Policemen—Extending Term of Office.

1. Section 31 of Article V of the Constitution, which declares that no law shall extend the term of any public officer, etc., does not apply to the provision of the Act of 1907 (Laws 1907, p. 344, creating a police commission in cities and towns), that an officer then serving on

the force may be reappointed, such appointment to hold during good behavior or until the incumbent shall become incapacitated—thus practically insuring to such officer an indeterminate tenure—since prior to his appointment under the provisions of the Act, he is obliged to pass an examination and serve a probationary period of six months, the same as any other applicant for such a position.—State ex rel. Quintin v. Edwards, 250.

Same—"Special Commission"—Constitutional Provision Inapplicable.

2. The Act establishing a police commission in cities and towns (Laws 1907, p. 344) does not violate section 36, Article V of the Constitution, declaring that the legislature shall not delegate to any special commission power to make, supervise or interfere with any municipal improvement, etc., or perform any municipal function whatever. The board thus created, *held*, not to be a "special commission" within the meaning of this section of the Constitution.—State ex rel. Quintin v. Edwards, 250.

Same—Policemen—"Municipal" Officers—Servants—Employees.

3. Strictly speaking, a policeman is not a "municipal" officer—that is, a "city" officer—as that term is used in section 16, Article VI of the state Constitution, declaring that the legislative assembly may provide for the election and appointment of such municipal officers as public convenience may require, but that their term of office shall not in any case exceed two years; nor is such officer a mere servant or employee of the municipality.—State ex rel. Quintin v. Edwards, 250.

Gaming—Statute—Constitutionality.

4. *Held*, that the Act of 1907 prohibiting certain forms of gambling (Laws 1907, p. 287 [secs. 8416-8436, Revised Codes]) is not open to the constitutional objection (Article V, sec. 23) that it contains more than one subject.—State v. Ross, 319.

Same—Penalties—Civil Action for Money Lost—Validity of Statute.

5. The anti-gambling law (Laws 1907, p. 287 [Revised Codes, secs. 8416-8436]) was not rendered invalid by the insertion of section 15 (sec. 8430, Revised Codes), creating a right of action in favor of one losing at any of the prohibited games, to recover the amount lost together with exemplary damages. The right thus given is in the nature of a penalty and constitutes a part of the penalty provided by the Act. The only limit placed by the Constitution upon the legislature in fixing punishments for crimes is that no excessive fines be imposed or cruel and unusual punishments inflicted.—State v. Ross, 319.

Legislative Procedure—Final Passage—Vote.

6. After a bill has, on third reading, passed the house in which it originated, the vote being taken by ayes and noes and the names of those voting entered on the journal, as required by section 24, Article V of the Constitution, and is amended in the other house of the legislative assembly, and then returned to the first for action on the amendments, it is not necessary that the vote on the adoption of the amendments thus made be again taken by ayes and noes and the names entered on the journal.—Johnson v. City of Great Falls et al., 369.

License Taxes—Raising Revenue—Legislature cannot Delegate Power.

7. The Constitution, section 1, Article XII, in giving to the legislature the sole right to raise revenue by the imposition of a license tax upon persons and corporations doing business in the state, has thereby denied the power to any other body; and, therefore, the legislature cannot delegate the authority thus conferred to cities and towns.—Johnson v. City of Great Falls et al., 369.

CONSTITUTION OF MONTANA.

(List of Sections Cited or Commented upon.)

Article III, section 15..... 118
Article III, section 24..... 417
Article III, section 29..... 373
Article V, section 2..... 264
Article V, section 17..... 263
Article V, section 23..... 322
Article V, section 24.....371, 373
Article V, section 31.....258 *et seq.*
Article V, section 36.....258 *et seq.*
Article VII, section 1..... 264
Article VII, section 7..... 264
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Article XII, section 1..... 373
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Article XVI, section 4..... 264
Article XVI, section 5..... 264
Article XVI, section 6.....258 *et seq.*
Article XVIII, section 1..... 264

CONTEMPT.

Purpose of Proceedings.

1. The object of contempt proceedings is vindication of the authority of the court, and not indemnity for the plaintiff or any judgment in his favor.—Dunlavey v. Doggett et al., 204.

Attorneys' Fees—Costs of Litigation—Not Recoverable.

2. *Held*, that, in the absence of statute on the subject, attorney's fees and other expenses incurred by the owner of a water right in instituting and prosecuting to a successful determination a contempt proceeding for the violation of a decree of court settling his rights, are not recoverable as items in an action against the contemnor for damages proximately caused by his disobedience of the order.—Dunlavey v. Doggett et al., 204.

CONTRACTORS.

Violation of eight-hour law,—see Criminal Law, 43.

CONTRACTS.

Construction—Public Policy.

1. Courts will not declare a contract void as against public policy, if by any reasonable construction it can be upheld.—Lawson v. Cobban et al., 138.

CONTRIBUTORY NEGLIGENCE.

See Personal Injuries.

CONVERSION.

District Judges—Who may File Affidavits of Disqualification.

1. *Held*, in an action in conversion against a sheriff, that the plaintiff at whose instance and request the sheriff under a writ of attach-

ment levied upon the property in controversy and who had indemnified the officer, was the real party in interest in the action in conversion and could file an affidavit disqualifying the trial judge, although he had not intervened and was not a party to the record.—Gehlert v. Quinn, 1.

Pleadings—Motion to Strike—Refusal—Harmless Error.

2. Error in refusing to grant a motion, in an action in conversion, to strike out a portion of the replication which, referring to proceedings on attachment had in a justice's court, were said to contain allegations argumentative in character and charging defendants with gross wrongdoing, was harmless, where during the trial the entire record of the proceedings had in the justice's court was on plaintiff's motion excluded, and where the court in its instructions submitted only the issues presented by the complaint and the denials in the answer.—Shandy v. McDonald et al., 393.

Evidence—Admissibility—Harmless Error.

3. Where in an action in conversion the court charged the jury that, if they found for plaintiff, they should fix the value of two horses at the figure at which plaintiff bid them in at the judicial sale, together with interest, error in the admission of other evidence touching value was harmless.—Shandy v. McDonald et al., 393.

Same—Review—Record.

4. Where the record of attachment proceedings had in a justice's court, offered in evidence in support of the justification pleaded in the answer to an action in conversion, was not incorporated in the bill of exceptions, the propriety of the court's ruling in excluding the evidence will not be reviewed on appeal.—Standy v. McDonald et al., 393.

Justification—Void Proceedings—Admissibility.

5. *Obiter;* Evidence of proceedings had in a justice's court on a suit in attachment, is admissible in an action for conversion of the same property, as tending to show good faith on the part of the defendants and to rebut any inference of malice, even though such proceedings were void.—Shandy v. McDonald et al., 393.

Exemplary Damages—Complaint—Sufficiency.

6. The complaint in an action for damages for a conversion which alleged, *inter alia,* that defendants "did unlawfully, maliciously, fraudulently and oppressively take and carry away" the property in controversy, and refused restitution of the same after repeated demands, was broad enough to warrant inquiry into the motives and behavior of defendants, and to justify the giving of an instruction that exemplary damages might be awarded for oppressively, fraudulently or maliciously withholding the chattels after demand.—Shandy v. McDonald et al., 393.

Excessive Damages.

7. Where it is impossible to determine what portion of the damages allowed in an action for conversion was for exemplary damages, and where, after adding to the value of the property the amount expended by plaintiff in pursuit of it, there remained but a small margin for punitive damages, the verdict may not be said to be excessive, even though it was in excess of the value of the property as fixed by all witnesses except the plaintiff.—Shandy v. McDonald et al., 393.

Exemplary Damages—Jury—Discretion.

8. The allowance of exemplary damages in an action for a conversion lies within the discretion of the jury under the evidence adduced.—Shandy v. McDonald et al., 393.

CONVEYANCES.

See Probate Proceedings, 8-10.

CORPUS DELICTI.

Proof,—see Criminal Law, 26.

COSTS.

Contempt Proceedings—Attorney's Fees—Costs of Litigation—Not Recoverable.

1. *Held*, that, in the absence of statute on the subject, attorney's fees and other expenses incurred by the owner of a water right in instituting and prosecuting to a successful determination a contempt proceeding for the violation of a decree of court settling his rights, are not recoverable as items in an action against the contemnor for damages proximately caused by his disobedience of the order.—Dunlavey v. Daggett et al., 204.

CRIMINAL LAW.

Intoxicating Liquors—Selling to Females—Information—Sufficiency.

1. An information charging defendant with having permitted a female to be or remain in his saloon for the purpose of being there supplied with liquor,—contrary to the provisions of section 8385, Revised Codes,—which alleged that defendant was "then and there" the owner and manager having charge and control, was sufficient to apprise him that he was accused of being in control "for the time being" (the words used in the statute), and therefore sufficient under section 9155, Revised Codes, providing that words used in a statute to define a public offense need not be strictly pursued in the information, but words conveying the same meaning may be used.—State v. Conway, 42.

Same—Evidence—Sufficiency.

2. Evidence adduced in a prosecution for the offense of allowing females to remain in a saloon for the purpose of being supplied with liquor, *held* sufficient to show that defendant, who had formerly owned the saloon but had sold it to his nephew, was for the time being in actual charge and control of the saloon.—State v. Conway, 42.

Verdict—Evidence—Sufficiency.

3. A verdict of conviction of a public offense will not be disturbed on appeal where the evidence, though conflicting, is sufficient to sustain it.—State v. Conway, 42.

Robbery—Evidence, Hearsay—Maps—Admissibility—Harmless Error.

4. Where defendant, charged with robbery, consented during the trial that the bailiff, in company with the prosecuting witness, might go over the route taken by the latter and defendant in the streets of a city on the night of the alleged offense, so as to enable the complaining witness, who was unfamiliar with the streets, to describe the place where the offense was committed, and the bailiff, having prepared a map of the streets traversed and indicated on it a spot pointed out by the prosecuting witness as the place where he was assaulted, thereafter testified from it, without objection, relative to the trip taken, the formal admission of the map, over defendant's objection that it was hearsay, if error, was nonprejudicial.—State v. De Hart, 211.

Same—Motion to Strike—Waiver of Objection.

5. The court properly overruled defendant's motion to strike out the bailiff's testimony relative to what the prosecuting witness told him as to where the crime referred to in the above paragraph had been committed, the trip having been taken with his consent and no objection made at the time the evidence was received.—State v. De Hart, 211.

Same—Refreshing Recollection.

6. The prosecuting witness had a right to refresh his memory as to where the assault was committed, by going over the route taken by

himself and the defendant on the night of its commission, if by so doing he was enabled to identify the objects along the route theretofore taken by them; and his testimony thereafter as to the place was not objectionable.—State v. De Hart, 211.

Exclusion of Evidence—Curing Error.

7. Alleged error in sustaining an objection to a question asked on behalf of defendant was cured where the testimony sought to be elicited was immediately thereafter given by the same witness.—State v. De Hart, 211.

Admissions—Confessions—Voluntary Character—When Immaterial.

8. Where defendant testified on the trial to practically the same matters which police officers were permitted to give in evidence touching conversations had with him after his arrest, and where it appeared that at no time did defendant admit or confess the crime with which he was charged, but consistently denied it, the contention that such evidence was inadmissible inasmuch as it amounted to a confession, and that, before admitting it, the court should have satisfied itself that the admissions contained therein were voluntarily made, has no merit. While admitting the truth of the statements, he cannot complain that they were involuntarily made.—State v. De Hart, 211.

Cross-examination—Remarks of Court.

9. Where the record did not disclose that cross-examination by defendant's counsel was in fact limited, remarks of the judge commenting upon the method pursued by counsel on cross-examination in needlessly repeating questions did not constitute reversible error.—State v. De Hart, 211.

Prosecuting Witness—Evidence—Friendly Feeling Toward Defendant—Immateriality.

10. Friendly feeling of the prosecuting witness toward the defendant cannot be considered by the jury in arriving at their verdict; and hence evidence that the prosecuting witness did not have defendant arrested of his own free will, and that he bore him no malice, was inadmissible. State v. De Hart, 211.

Evidence—*Res Gestae*—Erroneous Admission—When Harmless.

11. In a criminal prosecution, the erroneous admission of evidence as part of the *res gestae* was not prejudicial to defendant, where he himself on the stand admitted the very facts shown by the testimony thus erroneously admitted.—State v. De Hart, 211.

Cross-examination—Scope.

12. Defendant having testified on his direct examination that he went to a certain city on the morning after the alleged robbery, a question by the county attorney whether he did not go to a different city and write a letter to a certain person was proper cross-examination, as bearing upon the truth of his statement on his examination in chief.—State v. De Hart, 211.

Evidence—Admissibility—Prejudice—When Defendant may not Complain.

13. Defendant, in answering the question referred to in the foregoing paragraph, volunteered the statement that he wrote the letter in the town to which he had testified he went after the alleged offense, and from there had sent the letter to another town to be posted so as to make it appear that he had gone to the latter place. *Held*, that, if prejudice resulted from permitting the question to be answered, it was his own fault, and he could not complain.—State v. De Hart, 211.

Evidence—Rebuttal—Discretion.

14. Whether matters which properly constituted a part of the state's case in chief were admissible in rebuttal, lay within the sound discretion of the trial judge, and where opportunity was given defendant

to meet the testimony thus adduced and abuse of discretion was not shown, the action of the court will be held proper.—State v. De Hart, 211.

Homicide—Information—Sufficiency.

15. An information alleging that at a specified time and place defendant did "willfully, unlawfully, feloniously, premeditatedly and of his malice aforethought kill and murder" a certain person, was sufficient to charge murder.—State v. Hayes, 219.

Same.

16. Allegations sufficient for a common-law indictment for murder being sufficient for an information charging that crime under the statute, it was not necessary that the charging part of such pleading should set forth the facts showing how and by what means the killing was done.—State v. Hayes, 219.

Same—Conspiracy—Evidence—Sufficiency.

17. Where, on a trial for the murder of a guard in the penitentiary, the evidence showed that the object of the conspiracy between accused and certain other prisoners was to effect an escape by force, that the disabling or killing of the officers whose presence tended to prevent the escape was a part of the conspiracy, that defendant was a party to the entire plan, and that he assaulted the warden at about the time the others were assaulting the guard, the killing of the latter was a part of the main transaction, justifying the conviction of accused for the murder.—State v. Hayes, 219.

Motion in Arrest of Judgment—Appeal.

18. An appeal does not lie from an order overruling a motion in arrest of judgment. Such an order is reviewable only on appeal from the judgment.—State v. Brown, 309.

Larceny by Bailee—Indictment—Sufficiency.

19. An indictment charging defendant with larceny as bailee in the words of the statute (section 8642, Revised Codes) and in the form prescribed by section 9148, was sufficient, and not open to the objection that it failed to describe the character of bailment.—State v. Brown, 309.

Same—Executory Agreement of Partnership.

20. While partners cannot commit larceny of the funds or property of the partnership, this immunity does not attach so long as the partnership agreement is executory only and the conditions of the agreement remain unfulfilled.—State v. Brown, 309.

Same.

21. Defendant and the prosecuting witness entered into an agreement to engage as partners in a business venture, the former furnishing the experience and the latter the means. The complaining witness turned over certain sums of money to defendant for the purpose of obtaining a license, purchasing supplies, etc., who thereupon appropriated the money to his own use and absconded. *Held*, that the contract of partnership was never executed, but that defendant repudiated it by his conduct, and thus became the bailee of his prospective partner.—State v. Brown, 309.

Same—Evidence—Exclusion—Harmless Error.

22. Error in excluding an offer of proof tending to show that the complaining witness in a prosecution for larceny by bailee had turned over to defendant less money than he claimed, was cured by the admission of testimony which included all the evidence in the offer.—State v. Brown, 309.

Gaming—Statute—Constitutionality.

23. *Held*, that the Act of 1907 prohibiting certain forms of gambling (Laws 1907, p. 287 [secs. 8416-8436, Revised Codes]) is not open to

the constitutional objection (Article V, sec. 23) that it contains more than one subject.—State v. Ross, 319.

Same—Penalties—Civil Action for Money Lost—Validity of Statute.

24. The anti-gambling law (Laws 1907, p. 287 [Revised Codes, secs. 8416-8436]) was not rendered invalid by the insertion of section 15 (sec. 8430, Revised Codes), creating a right of action in favor of one losing at any of the prohibited games, to recover the amount lost, together with exemplary damages. The right thus given is in the nature of a penalty and constitutes a part of the penalty provided by the Act. The only limit placed by the Constitution upon the legislature in fixing punishments for crimes is that no excessive fines be imposed or cruel and unusual punishments inflicted.—State v. Ross, 319.

Same—Information—Sufficiency.

25. An information charging a violation of the anti-gambling law in the words of the statute (sec. 1, Act of 1907, p. 287 [sec. 8416, Revised Codes]) viz.: that defendant willfully, etc., "did open, carry on * * * a certain game of studhorse poker for money," etc., was sufficient, and it was not necessary to describe the game in detail or set out the means by which it was carried on.—State v. Ross, 319.

Homicide—*Corpus Delicti*—Proof.

26. In a prosecution for murder, the only fact required to be proved directly, under section 8298, Revised Codes, is the death of the person alleged to have been killed, and not the identity of the deceased or the fact that the killing was done by the defendant.—State v. Nordall, 327.

Same—Circumstantial Evidence—Admissibility.

27. Where the state relied on circumstantial evidence to convict the defendant of murder, everything found in and about the burned ruins of the cabin in which a family of five was found dead, which tended to enlighten the jury and enable them to determine the ultimate question of the guilt or innocence of the defendant, was properly admitted in evidence.—State v. Nordall, 327.

Same—Exhibits—Exclusion—Remarks of Court—Prejudice.

28. The murder with which defendant was charged was committed in January. After the crime evidences of coal-oil were found on defendant's overalls and overshoes. On the trial witnesses for the defendant testified as to experiments made by them at the time of the trial (in June) by pouring coal-oil on overalls and overshoes, but no attempt was made to show what, if any, effect the difference in temperature and atmospheric conditions would have upon the tendency of oil to soak into substances or evaporate. When the articles with which the experiments had been made were offered in evidence, the court rejected them with the remark that, without showing such conditions, the experiments were worthless. Afterward, however, the court offered to allow the articles to go in evidence, provided defendant's counsel would put an analytical chemist on the stand to testify to the effect of temperature on evaporation of coal-oil. This offer was declined. *Held*, that under the circumstances prejudicial error was not committed, either in rejecting the exhibits or in making the remark that without such showing the evidence was worthless.—State v. Nordall, 327.

Same—Confessions—Admissibility—Evidence.

29. Evidence adduced in a prosecution for murder, examined and *held* not to show that a confession made by accused was made "under the influence of the flattery of hope and the coercion of fear," but was voluntary, and therefore admissible.—State v. Berberick, 423.

Same—Confessions—Admissibility—Question for Court.

30. The question of the admissibility of a confession alleged to have been made by defendant while in custody is one to be determined by

the court after hearing evidence, in the presence of the jury, relative to the circumstances under which it was made, and its finding thereon will not be disturbed on appeal, unless clearly against the weight of the evidence.—State v. Berberick, 423.

Same—Confessions—Incompetent Defendant—Evidence—Exclusion—Error.

31. Before the confession of one on trial for homicide was admitted in evidence his counsel offered proof that at the time of making it the defendant was of unsound mind. The offer was rejected. *Held*, that the court erred inasmuch as the accused was thereby deprived of the right to show that at the time of making the confession he was not a competent witness (Revised Codes, sec. 7891); and the fact that the jury, in passing upon the worth of the confession and the question whether he was capable of committing crime on the date of the murder, had the benefit of the testimony of expert and lay witnesses to the effect that defendant was insane, did not render the error nonprejudicial, since the trial judge, in determining the competency of the confession, was not advised of the mental condition of the defendant at the time he made it.—State v. Berberick, 423.

Same—Confessions—Substance of—Witnesses.

32. Witnesses who do not recollect the exact words used by defendant in making a confession were properly permitted to give the substance of what was said.—State v. Berberick, 423.

Same—Written Confessions—Effect of Signing.

33. Where a confession was taken down in writing, but not in the exact words used by defendant, he, by signing it and adopting the language employed, made it his own.—State v. Berberick, 423.

Same—Opinion Evidence—Mental Condition.

34. Where the mental condition of defendant, accused of homicide, was a matter to be considered by the jury in determining what weight should be given to a confession alleged to have been made by him, and where witnesses had testified that he was insane or affected with insanity, it was error to sustain an objection to a question asked a lay witness, whether in his opinion, judging from his acquaintance with defendant, the latter was weak-minded.—State v. Berberick, 423.

Same—Insanity—Lay Witness—Sufficient Acquaintance—Discretion.

35. The court did not err in refusing to permit counsel for defendant to cross-examine an under-sheriff, in whose custody the accused had been for a period of about six months prior to his trial, as to his acquaintance with defendant, before stating that in his opinion the latter was sane. The question whether the witness had sufficient acquaintance with accused to qualify him to testify as to the sanity of the latter, was addressed to the court's discretion, subject to review in case of clear abuse only.—State v. Berberick, 423.

Same—Weight of Confession—Correct Instruction.

36. An instruction to the jury in a criminal cause that they should treat an alleged written confession precisely as they would any other evidence in the case, that they were not bound to believe the statements contained therein, but should give them such weight as they thought proper, in view of all the other facts and circumstances under which it was made, including defendant's mental condition, his age, intelligence, character, disposition and experience, the fact that he was under arrest at the time, and the statements, threats or promises, if any, made to him, was correct.—State v. Berberick, 423.

Same—Reasonable Doubt—Acquittal—Erroneous Instruction.

37. In a prosecution for homicide, a charge that if, after a fair consideration of the entire testimony, the jury should entertain any reasonable doubt as to whether decedent came to his death in any other manner than that charged in the information, acquittal should follow,

was erroneous; the true rule being that, if the jury have any reasonable doubt that decedent came to his death in the manner charged in the information, they should acquit.—State v. Berberick, 423.

Same—Information—Deliberation and Premeditation—Surplusage.

38. The elements of premeditation and deliberation are matters of proof, from which the jury may draw their own inference in fixing the degree of murder charged against defendant, and need not be alleged in the information; hence, an objection to such a pleading that, in alleging that accused willfully, etc., and of his "deliberately premeditated" malice aforethought killed another, the terms "deliberately" and "premeditated" characterized the malice and not the killing, and were, therefore, abortive as elements of the definition of murder in the first degree, was without substance. The words quoted were surplusage.—State v. Nielson, 451.

Same—Information—Sufficiency—Murder in Second Degree—Manslaughter.

39. Where defendant was convicted of manslaughter under an information which charged all the elements of murder in the second degree, he will not be heard to complain that the pleading was insufficient to charge murder in the first degree.—State v. Nielson, 451.

Same—Information—Means of Killing.

40. In charging murder it is not necessary that the means by which the killing was done should be alleged.—State v. Nielson, 451.

Same—Defenses—Instructions—Limiting Evidence to Certain Purposes.

41. Where the defendant in a prosecution for homicide, relied solely upon the defense that the killing was excusable, because accidental, and done while accused was attempting to disarm deceased, who, while hunting, was trespassing on lands in defendant's charge, an instruction which, in restricting evidences of trespasses to the purposes of aiding the jury in determining why defendant was armed at the time and whether the killing was accidental, practically withdrew from the jury's consideration evidence showing justification or palliation, was not prejudicial to defendant. The court did not err in not recognizing a defense upon which accused himself did not rely.—State v. Nielson, 451.

Same—Instructions—Commenting on Weight of Evidence.

42. Nor was the instruction, referred to in the following paragraph, objectionable as commenting upon the weight of the evidence, where, in restricting the evidence to the purposes indicated, it became necessary to refer to it, but, in doing so, the court did not express any opinion as to the weight which the jury should give to it.—State v. Nielson, 451.

Violation of Eight-hour Law—Employer and Employee—Contractors—Subcontractors—Evidence—Insufficiency.

43. H., a general contractor, sublet to others a contract for the construction of a city sewer. Thereafter he had no further control of the work except to the extent of seeing that the requirements of his contract with the city were complied with. The men employed were paid by the subcontractors, who had exclusive control over and direction of them. H. was charged with a violation of the eight-hour law (Revised Codes, secs. 1739, 1740), and convicted. *Held*, that defendant did not sustain the relation of employer to any of the men employed by the subcontractors, and could therefore not be held responsible for the conduct of the latter in requiring their men to work more than eight hours a day.—State v. Hughes, 468.

Homicide—Offer of Proof—Exclusion—When Proper.

44. In a prosecution for homicide, an offer of proof, some matters contained in which were competent and others incompetent because hearsay, was properly excluded as a whole.—State v. Hanlon, 557.

Same—Evidence—Admissibility.

45. Defendant and deceased were members of two opposing factions in a mining town. The defendant knew that the latter had made threats against his life. An attempt had been made to kill him the night before the homicide. Among other acts of violence by the deceased was the "shooting up" and demolishing of a saloon, owned by defendant's employer, also a member of the faction to which accused belonged. Of this occurrence, which happened the night before the killing, defendant had no personal knowledge, but had been informed thereof by others, and also by deceased during an interview sought by him and which culminated in the affray. Counsel for defendant thereupon offered to prove by a witness who was present at the incident in the saloon, that deceased had given him and others money for the purpose of raising a disturbance there, that they and deceased went there for that purpose, and the latter fired numerous shots and assaulted the barkeeper, knocking him senseless. This offer was excluded. *Held,* that the evidence was admissible as tending to furnish a basis for a conclusion by the jury, in view of the threats theretofore made by deceased, that defendant, with knowledge of deceased's conduct at the saloon, had just ground for apprehension that his life was in danger or that he might suffer great bodily harm at the hands of deceased, and therefore acted in self-defense.—State v. Hanlon, 557.

Same.

46. The offered evidence referred to in the above paragraph was further admissible as showing one of a series of acts of violence leading up to the killing, and indicating a continuous aggressive and dangerous disposition in deceased, as well as shedding light upon the motives of deceased in seeking the interview with defendant which ended in the killing, and at which, according to defendant's testimony, deceased referred to the incident in the saloon and impliedly threatened him with violence of the same character if he persisted in opposing the faction to which he, deceased, belonged.—State v. Hanlon, 557.

Same.

47. The defendant having testified that deceased, in his interview with him, alluded to the occurrence in the saloon on the night previous, the excluded evidence was also admissible as tending to corroborate that statement.—State v. Hanlon, 557.

Same—Specific Act of Violence—Discretion.

48. In the admission of evidence of the character of that included in the offer of proof referred to in paragraph 45 above, the court should be guided by a wise discretion; but in all cases where the specific act sought to be called to the attention of the jury, by reason of its proximity in time and place, would legitimately reflect upon the conduct or motives of the parties at the time of the affray, and especially when it bears some relation to the homicide, it should be admitted; and the fact that collateral issues may thus be presented cannot be held conclusive against the value of the evidence.—State v. Hanlon, 557.

Same—Cross-examination.

49. A witness for the state had testified on direct examination that defendant had made threats against deceased a short time prior to the homicide. The witness was shown to have been financially interested in a mining company, the adherents of which composed the faction to which deceased belonged. On cross-examination he was asked if he had not stated in the presence of certain persons named that deceased, when he struck defendant over the head with a club immediately before the killing, had done just what he and the managing director of the company had told him to do. He was not permitted to answer. *Held,* to have been proper cross-examination. The witness' evidence in

chief was material and damaging to defendant, and an affirmative answer would have shown that he was an interested witness, while a negative one would have opened the way to contradiction.—State v. Hanlon, 557.

Same—Evidence—Insufficient Knowledge.

50. Where a witness' answer showed a want of sufficient knowledge to enable him to testify on the subject about which he was interrogated, his statement was properly stricken out.—State v. Hanlon, 557.

Same—Evidence—Admissibility.

51. A witness for defendant testified that when deceased fell he saw a pistol fall as if coming from his hand, that he picked it up and kept it until the day of the trial. On cross-examination he stated that he had told the sheriff a few days after the shooting that he had not seen any pistol fall from the body of the deceased. On redirect examination he was asked to give his reasons for making such statement to the sheriff, but was denied permission to answer. The ruling *held* to have been error. In view of the material importance of the evidence, and for the purpose of removing the suspicion that his testimony on direct examination was a fabrication, he should have been permitted to give his reasons for making the apparently inconsistent statement to the sheriff.—State v. Hanlon, 557.

Same.

52. Evidence that a few weeks before the homicide witness met deceased, who was armed, and stated to witness that he was going to a certain mining claim, and that if accused was there he was going to put him off, was admissible as showing a spirit of antagonism in deceased toward accused, as well as a disposition to take the law into his own hands.—State v. Hanlon, 557.

Same—Evidence—Conspiracy.

53. Evidence of an agreement or general understanding between the members of one faction to drive out of a community, by means of force and violence if need be, all persons belonging to another, was competent in a prosecution for homicide charged against a member of the latter class,—who pleaded self-defense,—as reflecting upon the attitude of the defendant's mind, and that of the deceased, at the time of the killing.—State v. Hanlon, 557.

Same—Threats Against a Class—Evidence.

54. A hostile threat against a class of persons is a manifestation of a hostile state of mind against each person of that class.—State v. Hanlon, 557.

Same.

55. Words and acts of one class of persons banded together for an unlawful purpose, importing hostility to another class, are imputable to all who belong to it, and, upon an issue of self-defense on a charge of murder alleged to have been committed by a member of the latter class upon one of the former while the deceased was apparently in pursuit of the common hostile purpose, should be received in evidence in favor of defendant, subject to the limitation that a wise discretion be exercised by the court in its admission, reviewable only in case of manifest abuse.—State v. Hanlon, 557.

Same—Instructions—Presumption of Innocence.

56. The court, after fully instructing the jury relative to the presumption of innocence, gave an additional charge that such presumption was not intended to aid a person, who is in fact guilty of a crime, to escape proper punishment, but was designed to prevent the conviction of an innocent person unjustly accused. *Held*, that while the instruction might as well have been omitted, it correctly stated the purpose of the pre-

sumption and was not open to the complaint that, by implication, if not directly, it told the jury that if the defendant was in fact guilty of the crime charged against him, he was not entitled to the presumption of innocence.—State v. Hanlon, 557.

CROSS-EXAMINATION.

See Evidence, 13, 16, 25, 28.

CUSTOM.

See Evidence, 8.

DAMAGES.

1. Exemplary,—see Conversion, 6, 8.
2. Excessive,—see Conversion, 7.
3. Measure and elements of,—see Personal Injuries, 73.
4. To children of lawful age, by negligent killing of parent,—see Personal Injuries, 22.
5. Wrongful detention of real property,—see Real Property, 1.

DEATH.

By negligence,—see Personal Injuries.

Instantaneous, survival of action,—see Personal Injuries, 64.

DECREES.

See Judgments.

DEFAULT.

Setting Aside—Duty of Court.

1. It is the duty of the district court to set aside a default upon a proper showing, viz.: that the moving party has presented facts which excuse his delinquency, that his interests will be injuriously affected if the default be not set aside, and that he has a meritorious defense.—State ex rel. Kolbow v. District Court, 415.

Affidavits of Merits—Who may Make.

2. An affidavit of merits, on motion to set aside a default judgment, may be made by the attorney of an absent party, and the verification may be upon information and belief.—State ex rel. Kolbow v. District Court, 415.

Setting Aside—Refusal—Error—Supervisory Control.

3. Where, after the default of all persons claiming as heirs of a deceased person, who did not appear on a certain date to establish their heirship, had been entered, foreign claimants filed a verified petition to set it aside, alleging that they did not become aware of decedent's death until after the default had been entered, that their interests would be lost to them if it was permitted to stand, and making a *prima facie* showing that they were heirs at law of the decedent, and where it appeared that they had exercised the utmost diligence in getting their claims before the district court, it was error to refuse to set aside the default. Order annulled on application for a writ of supervisory control.—State ex rel. Kolbow v. District Court, 415.

DENTISTRY.

Subject to police regulation,—see Municipal Corporations, 9, 11.

DISABILITY TO SUE.

See Partnership, 4.

DISCRETION.

Personal Injuries—Health—Opinion Evidence.

1. The question of the competency of a layman to give his opinion as to the state of plaintiff's health prior to a personal injury for which damages are sought, is one left to the sound judgment of the trial judge, subject to review only in case of a clear abuse of discretion.—Fearon v. Mullins, 45.

Insane Persons—Divorce—Guardians *Ad Litem*—Appointment—*Mandamus*.

2. The daughter of her insane father filed on his behalf, as next friend, a complaint demanding judgment that a decree of divorce, granted to the wife of the incompetent, be set aside because personal service of summons had not been made upon him, and asked that the court appoint a guardian *ad litem* to prosecute the action, his general guardian having refused to act. This request was refused on oral objection. *Held*, on application for writ of mandate, that conceding that the power of the district court to appoint a guardian *ad litem* is discretionary (Revised Codes, sec. 6481), such discretion does not extend to a refusal *in limine* to make the appointment and assume jurisdiction, when a *prima facie* right to prosecute the action is made to appear.—State ex rel. Happel v. District Court, 166.

When Put in Motion.

3. Before a district court can exercise judicial discretion, there must be facts and circumstances to put it in motion.—State ex rel. Happel v. District Court, 166.

Evidence—Rebuttal.

4. Whether matters which properly constituted a part of the state's case in chief were admissible in rebuttal lay within the sound discretion of the trial judge, and where opportunity was given defendant to meet the testimony thus adduced and abuse of discretion was not shown, the action of the court will be held proper.—State v. De Hart, 211.

New Trial—Conflicting Evidence.

5. Where the evidence is conflicting, a motion for a new trial on the ground of insufficiency of the evidence to sustain the verdict is addressed to the sound legal discretion of the trial court.—Garwood v. Corbett et al., 364.

Conversion—Exemplary Damages—Jury.

6. The allowance of exemplary damages in an action for a conversion lies within the discretion of the jury under the evidence adduced.—Shandy v. McDonald et al., 393.

Homicide—Insanity—Lay Witness—Acquaintance.

7. The question whether a witness in a criminal proceeding had sufficient acquaintance with defendant so as to qualify him to testify as to the sanity of the accused, was addressed to the court's discretion, subject to review in case of clear abuse only.—State v. Berberick, 423.

Homicide—Specific Act of Violence—Evidence.

8. In the admission of evidence of specific acts of violence in a prosecution for homicide, the court should be guided by a wise discretion; but in all cases where the specific act sought to be called to the attention of the jury, by reason of its proximity in time and place, would legitimately reflect upon the conduct or motives of the parties at the time of the affray, and especially when it bears some relation to the homicide, it should be admitted; and the fact that collateral issues may thus be presented cannot be held conclusive against the value of the evidence.—State v. Hanlon, 557.

DISMISSAL.

Appeal from Judgment—Lapse of Time.

1. An appeal from a judgment not taken within one year from the date of its entry will be dismissed.—Kaufman v. Cooper et al., 6.

Of Appeal from Justice's Court—Final Decision—Exceptions.

2. An order of the district court sustaining a motion to dismiss an action appealed to it from a justice's court is a "final decision"; and as such it is deemed to have been excepted to. (Revised Codes, sec. 6784.) Mettler v. Adamson et al., 198.

Appeal—Collusion—Evidence.

3. In order to justify the dismissal of an appeal on the ground of collusion between the parties, it must appear with reasonable certainty that they are guilty of the abuse charged in the motion to dismiss; else the appeal will be retained and reviewed on its merits.—Carlson v. City of Helena, 581.

Same—Collusion—Evidence—Insufficiency.

4. Plaintiff commenced an action to test the validity of certain bonds sought to be issued by a city. A demurrer was filed and submitted without argument, counsel for both parties, however, offering to submit briefs if desired by the court. The demurrer was overruled and defendant appealed. Thereupon certain members of the bar appeared as *amici curiæ* and moved that the appeal be dismissed on the ground of collusion. The evidence disclosed that plaintiff voted for the bonds, and that he would prefer to see them held valid; that counsel for defendant assisted his counsel in the preparation of the complaint, but that of this he had not any knowledge; and that he expected to pay the necessary costs and counsel fees; that he had no understanding or agreement with anyone as to the bringing of the suit or as to the issues he would present therein, or that anyone else would bear any part of the expenses. *Held*, not to warrant dismissal of the appeal on the ground alleged.—Carlson v. City of Helena, 581.

DISQUALIFICATION OF DISTRICT JUDGES.

See District Courts, 1, 2.

DISTRICT COURTS.

See, also, Discretion.

Judges—Disqualifying Affidavits—Liberal Construction of Statute.

1. Section 6315, Revised Codes, providing for the disqualification of a district judge by the filing of an affidavit that the party making it has reason to believe, and does believe, that he cannot have a fair and impartial trial before such judge because of the latter's bias or prejudice, should be liberally construed with a view to effect its object and promote justice.—Gehlert v. Quinn, 1.

Conversion—Who may File Affidavits of Disqualification.

2. *Held*, in an action in conversion against a sheriff, that the plaintiff at whose instance and request the sheriff under a writ of attachment levied upon the property in controversy and who had indemnified the officer, was the real party in interest in the action in conversion and could file an affidavit disqualifying the trial judge, although he had not intervened and was not a party to the record.—Gehlert v. Quinn, 1.

Judges—Disqualification—Power to Call Other Judge.

3. Under the provisions of section 6315, Revised Codes, authorizing a district judge, against whom a disqualifying affidavit has been filed, to call in another judge to sit in the action, one of the judges of a district court, divided into departments, may call in a judge from another dis-

trict without first calling upon one of the judges of his own court to preside.—Gassert v. Strong et al., 18.

New Trial—Remission of Portion of Verdict—Power of Court.

4. The district court has power to grant a new trial unless the successful party remit a portion of the judgment.—State ex rel. Cohn v. District Court et al., 119.

Cross-examination—Remarks of Court.

5. Where the record did not disclose that cross-examination by defendant's counsel was in fact limited, remarks of the judge commenting upon the method pursued by counsel on cross-examination in needlessly repeating questions did not constitute reversible error.—State v. De Hart, 211.

Bill of Exceptions—Amendments After Appeal—Power of District Court.

6. While the district court has power to amend its records so as to speak the truth, its authority in this regard does not extend to the amendment of an order after it has lost jurisdiction by the taking of an appeal from it; hence an order amending a certificate to a bill of exceptions, erroneously therein designated a statement on motion for new trial, so as to give it its proper title, which order was made pending appeal, was error.—Robinson v. Helena L. & Ry. Co., 222.

Default—Setting Aside—Duty of Court.

7. It is the duty of the district court to set aside a default upon a proper showing, viz.: that the moving party has presented facts which excuse his delinquency, that his interests will be injuriously affected if the default be not set aside, and that he has a meritorious defense.—State ex rel. Kolbow v. District Court, 415.

Findings—Request for—Duty of District Court.

8. Where, in an injunction suit to prevent an operator of a placer mine from allowing waters charged with tailings, sand and debris to flow into a city sewer, the defendant requested the court to make special findings, the method of procedure adopted by the court in merely marking the findings by the words "Given," "Found," and "Refused," disapproved.—City of Helena v. Hale, 481.

Same.

9. It is the duty of the district court to make findings upon a proper request therefor.—City of Helena v. Hale, 481.

DIVORCE.

Insane Persons—Summons—Personal Service.

1. In order to clothe the district court with jurisdiction in a suit for divorce brought by the wife against her insane husband, summons must have been served upon the latter personally. (Revised Codes, sec. 6519, subsecs. 5, 7.)—State ex rel. Happel v. District Court, 166.

Same—Setting Aside—Failure to Pursue Remedies—Independent Suit.

2. Where an appeal from a decree awarding a divorce to the wife of an insane husband, claimed to be void by reason of nonservice of summons on the defendant personally, would have been of no avail because the defect in the service of summons did not appear in the record, and even though a motion to vacate the decree, fair on its face, was not made within six months from its entry, the daughter of the incompetent was not precluded from thereafter bringing an independent suit, as next friend, to have the decree set aside, his general guardian having refused to act.—State ex rel. Happel v. District Court, 166.

Decree—Vacation—Summons—Defective Service.

3. A decree of divorce, secured without personal service of summons on a defendant insane person, may be vacated, the same as any other

judgment, for want of jurisdiction in the court to render it.—State ex rel. Happel v. District Court, 166.

Insane Persons—Divorce—Guardians *Ad Litem*—Appointment—Discretion—*Mandamus*.

4. The daughter of her insane father filed on his behalf, as next friend, a complaint demanding judgment that a decree of divorce, granted to the wife of the incompetent, be set aside because personal service of summons had not been made upon him, and asked that the court appoint a guardian *ad litem* to prosecute the action, his general guardian having refused to act. This request was refused on oral objection. *Held*, on application for writ of mandate, that conceding that the power of the district court to appoint a guardian *ad litem* is discretionary (Revised Codes, sec. 6481), such discretion does not extend to a refusal *in limine* to make the appointment and assume jurisdiction, when a *prima facie* right to prosecute the action is made to appear.—State ex rel. Happel v. District Court, 166.

EIGHT-HOUR LAW.

Violation,—see Criminal Law, 43.

ELECTION.

See Pleading and Practice, 25.

ELECTIONS.

Ballots—Manner of Marking—Statutes.

1. In an election contest the court properly refused to count for the Democratic candidate ballots marked as follows: (1) Where the cross was placed after the candidate's name and entirely without his party column; (2) where perpendicular lines were drawn through the names in the Republican column, but no cross was placed before his name; and (3) where his name was written in the Socialist column but no cross marked in the square before the name. In neither instance was there a substantial, or any, compliance with the provisions of section 552, Revised Codes, relative to how the elector shall prepare his ballot.—Carwile v. Jones, 590.

Same.

2. By placing a cross in the square before the blank space left below a candidate's name, and failing to write in such blank space the name of some person for whom he desired to vote, the elector did not vote for anyone.—Carwile v. Jones, 590.

Same.

3. The court properly refused to count a ballot for the Republican candidate which was marked by crossing out all the names in the other columns, but which failed to show an "X" before his name. While the intention of the voter is generally a very material consideration, he must express his intention substantially as indicated by the statute.—Carwile v. Jones, 590.

Same—Indorsement by Election Judges—Surplusage.

4. A ballot bearing the indorsement: "Voted by H. and M. [judges of election] for illegibility of voter," was not void on the ground that the reason given for assisting the voter was not one recognized by law. Section 555, Revised Codes, does not require the judges to certify the reason for assisting an elector, and the words "for illegibility of voter" were therefore surplusage; and in the absence of a showing why they gave assistance, it will be presumed that they regularly performed their official duties.—Carwile v. Jones, 590.

Same—Manner of Marking.

5. Where the cross-mark was placed *after* the candidate's name but within his party column, the ballot was void, since the elector did not substantially comply with the requirements of section 552, Revised Codes, that the "X" must be placed *before* the name.—Carwile v. Jones, 590.

Same—What Constitutes an "X."

6. Any mark within the square before the candidate's name, which can be said to be a crossing of two lines, will answer the requirement of the statute that the elector must place an "X" in such square; and in the absence of anything to indicate a purpose on his part to identify his ballot by the use of a third line within the square, a defect in the mark is not sufficient to vitiate the ballot.—Carwile v. Jones, 590.

Same—Manner of Marking.

7. The Socialist party had no candidate for the office over which the contest arose. A cross was placed before the name of every candidate in the Republican and Socialist columns, and the names in the other party columns had been crossed out. *Held*, that the ballot should not have been counted for the candidate in the Republican column. The ballot was one from which it was impossible to determine the elector's choice, and therefore void under section 575, Revised Codes. (MR. JUSTICE SMITH dissents.)—Carwile v. Jones, 590.

Same—Failure to Detach Stub—Effect.

8. The court erred in refusing to count a ballot, properly marked, but from which the stub had not been detached by the ballot judge as required by section 552, Revised Codes. A voter may not be disfranchised by the errors or wrongful acts of election officers.—Carwile v. Jones, 590.

Mutilated Ballots—Presumptions.

9. In the absence of any showing that a ballot was mutilated by the elector, the presumption is that the mutilation occurred after the ballot left his hands.—Carwile v. Jones, 590.

Ballots—Mutilation by Officers—Effect.

10. Where it was apparent from an inspection of a mutilated ballot, found in the ballot-box in two separate pieces and with one portion containing the names of two candidates in each party column missing, that it was torn by the ballot judge in detaching the stub, the court erred in refusing to count it.—Carwile v. Jones, 590.

Qualified Voter—Residence—"Removal."

11. During the months of July, August and October, 1907, certain persons came to Montana from the state of Iowa. They then selected and filed on homesteads, with the intention to make this state their future home. Shortly thereafter they returned to Iowa, without having made any improvements on their homesteads, for the purpose of arranging their affairs preparatory to returning to this state. In the spring of 1908, each brought his family to Montana and settled on his respective homestead, residing there continuously thereafter. None of them voted in Iowa between the fall of 1907 and the spring of 1908. They voted at the general election held in November, 1908. *Held*, that the court committed error in ruling that they were not legal voters; *held*, further, that having formed the intention, when filing on their homestead, to make Montana their future home, this state became and was their place of residence in the sense of that term as used in the election laws, and that their coming to this state in the summer of 1907, coupled with the selection of their new homes, constituted their "removal" from their former home.—Carwile v. Jones, 590.

ELECTRICITY.

See Personal Injuries, 35-43, 68-76.

EMINENT DOMAIN.

Indirect Damage—Erroneous Instruction.

1. An instruction submitted to the jury in a condemnation proceeding, that in determining the damages resulting to the land remaining after the severance of the portion taken, they should consider "those elements of *damage*, and those only, that would be agreed upon as reasonable elements by a reasonable buyer and seller" willingly trading in the open market, was erroneous and so far meaningless that it could only operate to confuse the jury, since there is no question of *damage* involved between parties trading in land in the open market.—Helena Power Transmission Co. v. McLean, 388.

Same.

2. Substituting the word "value" for the word "damage," referred to in the above paragraph, the instruction would be none the less objectionable, inasmuch as it substitutes the judgment of the intending buyer and seller trading in the open market for that of the jury upon the question what, if any, less value the remaining portion of the land has in its detached condition than it had as a portion of the entire tract.—Helena Power Transmission Co. v. McLean, 388.

Correct Instruction.

3. An instruction to the jury in a suit in eminent domain that, in determining the amount which defendant could recover, they should take into consideration every element of value which would be considered if parties were negotiating a voluntary sale, as between one who wants to purchase but is not compelled to do so, and one who wants to sell but is not compelled to sell, correctly stated the law.—Helena Power Transmission Co. v. McLean, 388.

Offers to Sell—Inadmissible Evidence.

4. It was error to instruct the jury in a suit to acquire land by the exercise of eminent domain, that what similar land had been offered for was legitimate evidence of the market value of the land. What similar land may have been offered for by a person not a party to the suit is inadmissible, as hearsay. The offer is not made under oath and the person making it is not subject to cross-examination.—Helena Power Transmission Co. v. McLean, 388.

EQUITY.

See, also, Interpleader; Trusts.

Appeal—Evidence—Findings—Review.

1. In equity cases it is incumbent upon appellant to show that the evidence preponderates against the findings of the trial court; if he is unable to do so, the supreme court will not interfere.—Gassert v. Strong et al., 18.

Tax Deeds—Quieting Title.

2. An action brought by a land owner under the provisions of section 6870, Revised Codes, to quiet the title to premises sold for delinquent taxes, is one in equity.—Larson v. Peppard, 128.

Same—Quieting Title—Condition Precedent to Maintaining Action.

3. *Held*, that the maxim, "He who seeks equity must do equity," applies in an action by a land owner to quiet title to land sold for delinquent taxes, and that, as a condition precedent to maintaining his action, the plaintiff will be required to pay to the tax deed holder the amount of taxes which plaintiff should have paid, even conceding that, by reason of irregularities, the sale did not divest the owner of title, and no action could have been maintained by the purchaser to recover back the amounts paid by him, and although the rule of *caveat emptor* applies to the purchase at a delinquent tax sale.—Larson v. Peppard, 128.

ESTATES OF DECEASED PERSONS.

See Probate Proceedings, 1-10.

ESTOPPEL.

Account Stated—Presumptions.

1. A settlement of accounts between two parties does not create an estoppel, but furnishes a strong *prima facie* presumption that the result thus reached is correct.—Johnson v. Gallatin Valley Milling Co., 83.

EVIDENCE.

See, also, Criminal Law, 29-36, 45-55.

Striking Out—Error.

1. In answer to a question how an opening on a porch into which plaintiff fell was situated, defendant answered that it was at the end of the porch, and that it was not necessary for a person going over the porch for a certain purpose to go near it. *Held*, that it was error to strike out the latter clause of the answer as not responsive to the question, it having been a natural explanation of the preceding portion thereof.—Fearon v. Mullins, 45.

Exclusion—When Harmless Error.

2. Error in striking out a part of an answer as not responsive was not prejudicial, where evidence of the same facts was afterward admitted without prejudice.—Fearon v. Mullins, 45.

Health—Opinion Evidence—Discretion.

3. The question of the competency of a layman to give his opinion as to the state of plaintiff's health prior to a personal injury for which damages are sought, is one left to the sound judgment of the trial judge, subject to review only in case of a clear abuse of discretion.—Fearon v. Mullins, 45.

Same—Opinion Evidence—Competency.

4. A lay witness who had known plaintiff for six years and had seen her frequently during that time was competent to testify as to her health prior to a personal injury; and the mere fact that he stated that it "is" good, instead of using the past tense of the verb, did not render his testimony incompetent, where it was obvious that he intended to do so.—Fearon v. Mullins, 45.

Waters and Water Rights—Appropriation—Insufficiency.

5. Evidence adduced by plaintiff in a suit to determine water rights, *held* insufficient to warrant a decree that plaintiff and her predecessor had appropriated a certain number of inches of water at a spring, where it did not appear when the water so appropriated was first used by such predecessor, when he dug a ditch by which it was sought to divert the water, when the water was applied for certain power purposes, or whether he did anything toward making an appropriation, other than the filing of a notice of appropriation.—Hilger v. Sieben et al., 93.

Personal Injuries—Mines—Admissibility.

6. Evidence that steam was injected through an exhaust pipe into an abandoned shaft, alleged to have been insufficiently timbered and the ground surrounding which negligently "left loose" by defendant company, and in walking over which an employee was killed by falling into it, was properly admitted under the allegations of the complaint. The effect of steam on the loose ground was competent to be shown.—Hollingsworth v. Davis-Daly Estates Copper Co., 143.

Same—Opinion Evidence—Admissibility.

7. A miner, who had testified that he examined the shaft the morning after the deceased fell into it, and could see no evidence of any timber-

ing, was properly allowed to answer a question whether, from his knowledge based upon such examination, he could say whether any timbers were beneath the collar of the shaft on the day before the accident.—Hollingsworth v. Davis-Daly Estates Copper Co., 143.

Same—Evidence—Custom.

8. The inquiry whether the method pursued by defendant company in making loose dirt and decomposed granite secure around the abandoned shaft, was the one commonly used in the community, was not objectionable.—Hollingsworth v. Davis-Daly Estates Copper Co., 143.

Criminal Law—Hearsay—Maps—Admissibility—Harmless Error.

9. Where defendant, charged with robbery, consented during the trial that the bailiff, in company with the prosecuting witness, might go over the route taken by the latter and defendant in the streets of a city on the night of the alleged offense, so as to enable the complaining witness, who was unfamiliar with the streets, to describe the place where the offense was committed, and the bailiff, having prepared a map of the streets traversed and indicated on it a spot pointed out by the prosecuting witness as the place where he was assaulted, thereafter testified from it, without objection, relative to the trip taken, the formal admission of the map, over defendant's objection that it was hearsay, if error, was nonprejudicial.—State v. De Hart, 211.

Same—Motion to Strike—Waiver of Objection.

10. The court properly overruled defendant's motion to strike out the bailiff's testimony relative to what the prosecuting witness told him as to where the crime referred to in the above paragraph had been committed, the trip having been taken with his consent and no objection made at the time the evidence was received.—State v. De Hart, 211.

Same—Refreshing Recollection.

11. The prosecuting witness had a right to refresh his memory as to where the assault was committed, by going over the route taken by himself and the defendant on the night of its commission, if by so doing he was enabled to identify the objects along the route theretofore taken by them; and his testimony thereafter as to the place was not objectionable.—State v. De Hart, 211.

Same—Exclusion—Curing Error.

12. Alleged error in sustaining an objection to a question asked on behalf of defendant was cured where the testimony sought to be elicited was immediately thereafter given by the same witness.—State v. De Hart, 211.

Same—Cross-examination—Remarks of Court.

13. Where the record did not disclose that cross-examination by defendant's counsel was in fact limited, remarks of the judge commenting upon the method pursued by counsel on cross-examination in needlessly repeating questions did not constitute reversible error.—State v. De Hart, 211.

Same—Prosecuting Witness—Friendly Feeling Toward Defendant—Immateriality.

14. Friendly feeling of the prosecuting witness toward the defendant cannot be considered by the jury in arriving at their verdict; and hence evidence that the prosecuting witness did not have defendant arrested of his own free will, and that he bore him no malice, was inadmissible. State v. De Hart, 211.

Same—*Res Gestae*—Erroneous Admission—When Harmless.

15. In a criminal prosecution, the erroneous admission of evidence as part of the *res gestae* was not prejudicial to defendant, where he himself on the stand admitted the very facts shown by the testimony thus erroneously admitted.—State v. De Hart, 211.

Same—Cross-examination—Scope.

16. Defendant having testified on his direct examination that he went to a certain city on the morning after the alleged robbery, a question by the county attorney whether he did not go to a different city and write a letter to a certain person was proper cross-examination, as bearing upon the truth of his statement on his examination in chief.—State v. De Hart, 211.

Same—Admissibility—Prejudice—When Defendant may not Complain.

17. Defendant, in answering the question referred to in the foregoing paragraph, volunteered the statement that he wrote the letter in the town to which he had testified he went after the alleged offense, and from there had sent the letter to another town to be posted so as to make it appear that he had gone to the latter place. *Held*, that, if prejudice resulted from permitting the question to be answered, it was his own fault, and he could not complain.—State v. De Hart, 211.

Same—Rebuttal—Discretion.

18. Whether matters which properly constituted a part of the state's case in chief were admissible in rebuttal lay within the sound discretion of the trial judge, and where opportunity was given defendant to meet the testimony thus adduced and abuse of discretion was not shown, the action of the court will be held proper.—State v. De Hart, 211.

Personal Injuries—Mortality and Annuity Tables—Conclusiveness—Erroneous Instruction.

19. An instruction charging the jury, unqualifiedly, in a personal injury action, that they could award to plaintiff such an amount as would purchase an annuity equal to the difference between what he could have earned if he had not been injured, and what he could earn in his injured condition, was erroneous. While standard mortality and annuity tables are competent evidence in such cases, they are not conclusive guides to the jury in awarding damages. In having recourse to them a variety of circumstances should be considered, such as advancing age and consequent diminishing earning capacity, plaintiff's health, habits, etc.—Robinson v. Helena L. & Ry. Co., 222.

Exclusion—Harmless Error.

20. Error in excluding an offer of proof tending to show that the complaining witness in a prosecution for larceny by bailee had turned over to defendant less money than he claimed, was cured by the admission of testimony which included all the evidence in the offer.—State v. Brown, 309.

Homicide—*Corpus Delicti*—Proof.

21. In a prosecution for murder, the only fact required to be proved directly, under section 8298, Revised Codes, is the death of the person alleged to have been killed, and not the identity of the deceased or the fact that the killing was done by the defendant.—State v. Nordall, 327.

Same—Circumstantial Evidence—Admissibility.

22. Where the state relied on circumstantial evidence to convict the defendant of murder, everything found in and about the burned ruins of the cabin in which a family of five was found dead, which tended to enlighten the jury and enable them to determine the ultimate question of the guilt or innocence of the defendant, was properly admitted in evidence.—State v. Nordall, 327.

Same—Exhibits—Exclusion—Remarks of Court—Prejudice.

23. The murder with which defendant was charged was committed in January. After the crime evidences of coal-oil were found on defendant's overalls and overshoes. On the trial witnesses for the defendant testified as to experiments made by them at the time of the trial (in June) by pouring coal-oil on overalls and overshoes, but no attempt

was made to show what, if any, effect the difference in temperature and atmospheric conditions would have upon the tendency of oil to soak into substances or evaporate. When the articles with which the experiments had been made were offered in evidence, the court rejected them with the remark that, without showing such conditions, the experiments were worthless. Afterward, however, the court offered to allow the articles to go in evidence, provided defendant's counsel would put an analytical chemist on the stand to testify to the effect of temperature on evaporation of coal-oil. This offer was declined. *Held*, that under the circumstances prejudicial error was not committed, either in rejecting the exhibits or in making the remark that without such showing the evidence offered was worthless.—State v. Nordall, 327.

Eminent Domain—Offers to Sell—Inadmissible Evidence.

24. It was error to instruct the jury in a suit to acquire land by the exercise of eminent domain, that what similar land had been offered for was legitimate evidence of the market value of the land. What similar land may have been offered for by a person not a party to the suit is inadmissible, as hearsay. The offer is not made under oath and the person making it is not subject to cross-examination.—Helena Power Transmission Co. v. McLean, 388.

Cross-examination—Scope.

25. The court's action in refusing to permit defendants in an action for conversion to cross-examine plaintiff,—who on his examination in chief had testified only as to his claim of ownership and the value of the property,—about matters which had no tendency to throw light upon the things deposed to by plaintiff, was correct.—Shandy v. McDonald et al., 393.

Conversion—Justification—Void Proceedings—Admissibility.

26. *Obiter:* Evidence of proceedings had in a justice's court on a suit in attachment is admissible in an action for conversion of the same property, as tending to show good faith on the part of the defendants and to rebut any inference of malice, even though such proceedings were void.—Shandy v. McDonald, 393.

Homicide—Mental Condition—Opinion Evidence.

27. Where the mental condition of defendant, accused of homicide, was a matter to be considered by the jury in determining what weight should be given to a confession alleged to have been made by him, and where witnesses had testified that he was insane or affected with insanity, it was error to sustain an objection to a question asked a lay witness, whether in his opinion, judging from his acquaintance with defendant, the latter was weak-minded.—State v. Berberick, 423.

Criminal Law—Cross-examination.

28. A witness for the state had testified on direct examination that defendant had made threats against deceased a short time prior to the homicide. The witness was shown to have been financially interested in a mining company, the adherents of which composed the faction to which deceased belonged. On cross-examination he was asked if he had not stated in the presence of certain persons named that deceased, when he struck defendant over the head with a club immediately before the killing, had done just what he and the managing director of the company had told him to do. He was not permitted to answer. *Held*, to have been proper cross-examination. The witness' evidence in chief was material and damaging to defendant, and an affirmative answer would have shown that he was an interested witness, while a negative one would have opened the way to contradiction.—State v. Hanlon, 557.

EXCEPTIONS.

See, also, Bill of Exceptions.

Appeal from Justice's Court—Dismissal—Final Decision.

1. An order of the district court sustaining a motion to dismiss an action appealed to it from a justice's court is a "final decision"; and as such it is deemed to have been excepted to. (Revised Codes, sec. 6784.) Mettler v. Adamson et al., 198.

Instructions—Review—Exceptions Necessary.

2. Error assigned to the giving of an instruction may not be reviewed on appeal where the record shows that counsel merely "objected" to its being given, but did not reserve an exception to the action of the court in overruling the objection, as required by section 6746, Revised Codes.—Robinson v. Helena L. & Ry. Co., 222.

EXCESSIVE VERDICTS.

See Verdicts.

EXECUTORS.

See Probate Proceedings.

EXEMPLARY DAMAGES.

See Conversion, 6.

FAILURE OF PROOF.

See, also, Personal Injuries, 54.

New Trial—Grounds—Variance.

1. While technically there is a distinction between "variance" and "failure of proof," yet where the term "failure of proof" is used as the equivalent of "insufficiency of evidence" there may not be any distinction, and where the evidence tends to establish a cause of action entirely different from that alleged in the complaint, there is such a variance as amounts to a failure of proof, and the question may be presented on a motion for a new trial under a specification of insufficiency of the evidence to justify the verdict.—Forsell v. Pittsburgh & Mont. Copper Co., 403.

FELLOW-SERVANTS.

See Personal Injuries, 14, 15, 37.

FINDINGS.

Equity Cases—Appeal—Evidence—Review.

1. In equity cases it is incumbent upon appellant to show that the evidence preponderates against the findings of the trial court; if he is unable to do so, the supreme court will not interfere.—Gassert v. Strong et al., 18.

Request for—Duty of District Court.

2. Where in an injunction suit to prevent an operator of a placer mine from allowing waters charged with tailings, sand and debris to flow into a city sewer, the defendant requested the court to make special findings, the method of procedure adopted by the court in merely marking the findings by the words "Given," "Found," and "Refused," disapproved.—City of Helena v. Hale, 481.

Same.

3. It is the duty of the district court to make findings upon a proper request therefor.—City of Helena v. Hale, 481.

Insufficiency—Defective Findings—Reversal, Where.

4. Where the court's findings in an injunction suit were so lacking in substance as to amount to no findings at all, the case was not one of de-

fective findings, but one which will demand a reversal of the decree for failure of findings to justify it.—City of Helena v. Hale, 481.

Conclusiveness.

5. Where the evidence does not preponderate against the trial court's findings, they will not be disturbed on appeal.—In re Grogan's Estate, 540.

FRAUD.

See Trusts, 2, 3; Account Stated, 3, 4.

GAMING.

See Criminal Law, 23-25.

GUARDIANS AD LITEM.

Appointment,—see Divorce, 4.

HARMLESS ERROR.

See Appeal and Error, 10, 28, 29, 30, 31, 32; Evidence, 2, 9, 13, 15, 17, 20.

HEIRSHIP.

See Probate Proceedings, 1.

HOMICIDE.

See Criminal Law, 15-17, 26-42, 44-56.

INDEPENDENT CONTRACTORS.

See Personal Injuries, 36.

INDICTMENT.

See Information.

INFORMATION.

1. Gaming,—see Criminal Law, 25.
2. Larceny by bailee,—see Criminal Law, 19.
3. Murder,—see Criminal Law, 15, 16, 38-40.
4. Selling liquor to female, sufficiency,—see Criminal Law, 1.

INJUNCTION.

See Findings, 2, 4.

INSANITY.

See Criminal Law, 31, 34, 35; Divorce, 1-4.

INSTRUCTIONS.

Request—When Refusal Proper.

1. Where a requested instruction covered the same ground as one given, refusal to give it was not error.—Hagerty v. Montana Ore Pur. Co. et al., 69; Longpre v. Big Blackfoot Milling Co., 99.

Master and Servant—Appliances—Duty to Inspect—Question for Jury.

2. While it is the duty of the master, after having provided the servant with reasonably safe and suitable appliances with which to work, to

JUDGMENTS.

Dismissal of appeal from,—see Dismissal, 1.

Entry of Judgment—Notice.

1. *Held*, that the entry of judgment is one of the "subsequent proceedings" mentioned in section 7149, Revised Codes, of which a defeated party or his attorney is entitled to notice.—State ex rel. Cohn v. District Court et al., 119.

Same—Notice—Service by Mail—When Insufficient.

2. Service of a notice upon an attorney can be made through the mail, only in the event that his place of residence is not known; therefore, where the location of both the office and residence of an attorney was known to opposing counsel, their notice to him, through the mail, of the entry of a judgment, was insufficient.—State ex rel. Cohn v. District Court et al., 119.

Same—Defective—Not Cured by Actual Receipt of Notice.

3. Since the notice mentioned in the foregoing paragraph was not a legal notice, i. e., one served according to law, the actual receipt of the letter notifying the attorney upon whom service was thus sought to be made, of the entry of judgment, was not effective, and his notice of intention to move for a new trial, served and filed after the lapse of ten days from receipt of the letter, was timely.—State ex rel. Cohn v. District Court et al., 119.

Tax Sales—Quieting Title—Form of Decree.

4. The court decreed that the plaintiff land owner's title to land, sold for delinquent taxes, be quieted, subject to a lien in favor of defendant for the amounts paid by him. The better practice in a case of this kind *held* to be, for the court to enter an order requiring plaintiff to make payment to defendant of the sums paid by the latter, with interest, within a reasonable time, the decree quieting title to be made upon payment, otherwise relief of any kind whatever to be denied plaintiff.—Larson v. Peppard, 128.

Setting Aside.

5. Though a judgment void on its face may be set aside on motion at any time, this may not be done where the judgment is fair on its face, the infirmity of which must be made to appear by evidence *dehors* the record.—State ex rel. Happel v. District Court, 166.

Same.

6. The power of the district court to vacate or modify a judgment fair on its face ceases at the expiration of six months after its entry.—State ex rel. Happel v. District Court, 166.

Same—Failure to Pursue Remedies—Independent Suit.

7. Where an appeal from a decree awarding a divorce to the wife of an insane husband, claimed to be void by reason of nonservice of summons on the defendant personally, would have been of no avail because the defect in the service of summons did not appear in the record, and even though a motion to vacate the decree, fair on its face, was not made within six months from its entry, the daughter of the incompetent was not precluded from thereafter bringing an independent suit, as next friend, to have the decree set aside, his general guardian having refused to act.—State ex rel. Happel v. District Court, 166.

Motion to Set Aside—Statute—Applicable to Judgments and Decrees.

8. There being no distinction between judgments at law and decrees in equity, except as to the character of relief granted by them, section 6589, Revised Codes, authorizing vacation of judgments fair on their face, within a reasonable time not exceeding six months, applies to both, subject to the rule that a court of equity will not interfere so long as

there is another subsisting adequate remedy.—State ex rel. Happel v. District Court, 166.

Divorce—Decree—Vacation—Summons—Defective Service.

9. A decree of divorce, secured without personal service of summons on a defendant insane person, may be vacated, the same as any other judgment, for want of jurisdiction in the court to render it.—State ex rel. Happel v. District Court, 166.

JURISDICTION.

New Trial Order—*Certiorari.*

1. *Certiorari* does not lie to review an order granting a new trial, where the district court had jurisdiction to hear the motion.—State ex rel. Cohn v. District Court et al., 119.

Insane Persons—Divorce—Summons—Personal Service.

2. In order to clothe the district court with jurisdiction in a suit for divorce brought by the wife against her insane husband, summons must have been served upon the latter personally. (Revised Codes, sec. 6519, subsecs. 5, 7.)—State ex rel. Happel v. District Court, 166.

Mandamus—Assumption of.

3. *Mandamus* lies to compel a district court to assume jurisdiction of an action, where, through an erroneous determination of a preliminary question of practice or procedure, the court refused to act, and no other remedy was available.—State ex rel. Happel v. District Court, 166.

Justices' Courts—Appeal—Jurisdiction of Appellate Court.

4. In an action appealed to the district court from a justice's court, the former has the same extent of jurisdiction as the latter had.—Mettler v. Adamson et al., 198.

Same—Interpleader—Effect on Jurisdiction.

5. Where a justice of the peace had jurisdiction of the subject matter and the parties, in an action which at its commencement was a strictly legal one (to recover $66.97 on account of labor performed), a proper substitution of parties defendant did not have the effect of converting the cause from a legal into an equitable action and depriving the justice of jurisdiction to proceed.—Mettler v. Adamson et al., 198.

Same—Equitable Defenses.

6. Defendants, properly substituted in an action before a justice of the peace brought by the assignee of a claim for labor, could not deprive him of jurisdiction by the interposition of a defense of which he had not jurisdiction, viz.: fraud in the assignment.—Mettler v. Adamson et al., 198.

Estates—Petition for Sale of Real Property—Contents.

7. *Held*, that the requirement of section 7562, Revised Codes, that the *condition* and *value* of the real estate of a deceased person shall be set forth in a petition to sell such real property to pay debts, is not jurisdictional; and that, upon a collateral attack, defects in the petition with reference to such matters will not operate to set aside the proceedings had on the petition for leave to sell, after the sale has been made and the purchaser has, in good faith, paid the purchase price and gone into possession of the land sold.—Plains Land & Improvement Co. et al. v. Lynch et al., 271.

Same—Irregularities—Errors Within Jurisdiction—Review.

8. Where the district court had jurisdiction to make an order of sale of a decedent's real estate, and the order itself was not void, any defects in the proceedings leading up to the sale were errors within jurisdiction, subject to review on appeal in the probate proceedings only, and not open to collateral attack by heirs seeking to set aside the sale for errors which amounted only to irregularities in the proceedings, and

which, under section 7625, Revised Codes, must be disregarded.—Plains Land & Improvement Co. et al. v. Lynch et al., 271.

JURY.

View of Premises—Verdict—Conclusiveness.

1. The evidence in a personal injury action having been conflicting and the premises where the accident occurred viewed by the jury, they were the exclusive judges to determine the facts, and with their determination in favor of plaintiff and the court's action in denying a new trial, the supreme court will not interfere on appeal.—Fearon v. Mullins, 45.

JUSTICES' COURTS.

Pleadings—Reply.

1. A reply is not one of the pleadings which may be filed in a justice's court.—Mettler v. Adamson et al., 198.

Appeal—Record—Papers—Identification.

2. Copies of papers incorporated in the record on appeal to the supreme court, in an action brought to the district court from a justice's court, which are not identified by a bill of exceptions, nor even referred to by the clerk's certificate as correct copies, will, on motion, be stricken out.—Mettler v. Adamson et al., 198.

Dismissal of Appeal from—Final Decision—Exceptions.

3. An order of the district court sustaining a motion to dismiss an action appealed to it from a justice's court, is a "final decision," and as such it is deemed to have been excepted to. (Revised Codes, sec. 6784.) Mettler v. Adamson et al., 198.

Appeal from—Record on Appeal to Supreme Court—How Made up.

4. The record on appeal to the supreme court in an action brought to the district court from a justice's court must be made up as in cases originating in the district court, and it is not necessary that the whole record be embodied in a bill of exceptions.—Mettler v. Adamson et al., 198.

Appeal—Jurisdiction of Appellate Court.

5. In an action appealed to the district court from a justice's court, the former has the same extent of jurisdiction as the latter had.—Mettler v. Adamson et al., 198.

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7. Defendants, properly substituted in an action before a justice of the peace brought by the assignee of a claim for labor, could not deprive him of jurisdiction by the interposition of a defense of which he had not jurisdiction, viz.: fraud in the assignment.—Mettler v. Adamson et al., 198.

LANDLORD AND TENANT.

Lease—Bond for Rent—Consideration.

1. A bond, given to secure the payment of rent, which was signed after the lease of the property had been executed, was not *nudum pactum*, where both instruments were executed on the same day and where the bond referred to and made the latter instrument a part of it. They

must be construed as having been executed contemporaneously and as amounting to one instrument.—Dodd v. Vucovich et al., 188.

Same.

2. The bond above referred to could not be said to have been without sufficient consideration for the further reason that, so far as the sureties were concerned, the understanding was that the lease would not become effective until the bond had been given; *i. e.*, the consideration for the execution of the bond was the favor which they received by having the lessee take possession of the leased premises.—Dodd v. Vucovich et al., 188.

Same—Modification of Conditions of Lease—Liability of Sureties.

3. A lease of real property provided that rent should be paid quarterly in advance. A bond was given to secure the rent. The lessor voluntarily and without consideration therefor, reduced the rent for one quarter and at different times permitted the lessee to make payments at irregular intervals, and not as provided in the lease. *Held*, under subdivisions 2 and 3 of section 5686, Revised Codes, that in the absence of any showing that the sureties on the bond were injured or prejudiced by the action of the lessor, they were not released from liability; *held*, further, that they were not released under subdivision 1 of said section, in view of section 5674, which provides that a promise by a creditor which for any cause is void or voidable at his option, does not alter the obligation of the principal within the meaning of section 5673, since the concessions made by the lessor were promises without consideration and therefore void as to him.—Dodd v. Vucovich et al., 188.

Same—Obligation of Sureties—How Construed.

4. While it is true that, in the absence of statute, the obligation of a surety is *strictissimi juris*, in this state the statutes covering the subject must control.—Dodd v. Vucovich et al., 188.

Same—Occupancy by Others than Lessee—Release of Sureties.

5. Where a lessee of premises failed in business during the life of the lease, and the lessor, without modifying or changing the lease in any respect, permitted others to take possession in order to minimize the damages recoverable under a bond given to secure payment of the rent, the sureties were not released by the action of the lessor in this respect.—Dodd v. Vucovich et al., 188.

LARCENY BY BAILEE.

See Criminal Law, 19-22.

LEASES.

See Landlord and Tenant.

LEGISLATIVE PROCEDURE.

See Constitution, 7.

LICENSE.

Appropriation of Water Right on Private Property—Revocation.

1. Where the record on appeal in a water right contest failed to disclose that plaintiff in making an appropriation of water upon the lands of defendant had resorted to condemnation proceedings or received a grant of an easement in that regard or acquired it by adverse user, plaintiff had only a license, which, not having been coupled with an interest or one for which a valuable consideration had been paid,

was revocable at the pleasure of the licensor or his successor in interest.—Prentice v. McKay et al., 114.

Same—Revocation—What May Constitute.

2. The action of a licensor in obstructing the use of water appropriated on his lands by means of a license not coupled with an interest or acquired for a valuable consideration, amounted to a revocation of the license.—Prentice v. McKay et al., 114.

LICENSE TAXES.

Statutes—Constitutionality—Cities and Towns.

1. *Held,* that House Bill 203 enacted into law in 1897 (Laws 1897, p. 203 [sec. 3259, Revised Codes]), authorizing cities and towns *inter alia* to impose a license tax upon professions and occupations, is not open to the constitutional objection that it was not passed as required by section 24, Article V of the Constitution, declaring that on final passage of a bill the vote shall be taken by ayes and noes and the names of those voting entered in the journal.—Johnson v. City of Great Falls et al., 369.

Raising Revenue—Legislature cannot Delegate Power.

2. The Constitution, section 1, Article XII, in giving to the legislature the sole right to raise revenue by the imposition of a license tax upon persons and corporations doing business in the state, has thereby denied the power to any other body; and, therefore, the legislature cannot delegate the authority thus conferred to cities and towns.—Johnson v. City of Great Falls et al., 369.

Power of Cities and Towns—Police Regulations.

3. While the legislature may not confer upon cities and towns the right to impose a license tax upon professions and occupations for the purpose of *raising revenue,* it may, in the absence of constitutional limitation, authorize them to impose such a tax in aid of *police regulations.* Johnson v. City of Great Falls et al., 369.

Dentistry—Cities and Towns—Police Regulations—Limit of Power.

4. The power of a city or town to impose a license tax upon the right to practice the profession of dentistry as a police regulation, does not imply the power to refuse to license and thus to prohibit the pursuit of the profession.—Johnson v. City of Great Falls et al., 369.

Cities and Towns—Occupation Licenses—Power to Impose.

5. Section 4, Article XII, which, in empowering cities and towns to assess and collect taxes, deals with revenue and taxation exclusively, does not impliedly deny the power to such municipalities to impose license taxes in furtherance of police regulations.—Johnson v. City of Great Falls et al., 369.

MANDAMUS.

Insane Persons—Divorce—Guardians *Ad Litem*—Appointment—Discretion.

1. The daughter of her insane father filed on his behalf, as next friend, a complaint demanding judgment that a decree of divorce, granted to the wife of the incompetent, be set aside because personal service of summons had not been made upon him, and asked that the court appoint a guardian *ad litem* to prosecute the action, his general guardian having refused to act. This request was refused on oral objection. *Held,* on application for writ of mandate, that conceding that the power of the district court to appoint a guardian *ad litem* is discretionary (Revised Codes, sec. 6481), such discretion does not extend to a refusal *in limine* to make the appointment and assume jurisdiction, when a *prima facie* right to prosecute the action is made to appear.—State ex rel. Happel v. District Court, 166.

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2. *Mandamus* lies to compel a district court to assume jurisdiction of an action, where, through an erroneous determination of a preliminary question of practice or procedure, the court refused to act, and no other remedy was available.—State ex rel. Happel v. District Court, 166.

MAPS.

See Evidence, 9.

MASTER AND SERVANT.

See Eight-hour Law; Personal Injuries, 1-23, 32-43, 52-64.

MAYOR.

Power to remove policemen,—see Municipal Corporations, 6.

MINES AND MINING.

See, also, Personal Injuries, 8-12, 18-23, 32-34, 65.

Adverse Suits—Findings—Conclusive When.

1. Findings of the trial court, in an adverse suit to a mining claim, supported by a substantial preponderance of the testimony, will not be disturbed on appeal.—Nichols et al. v. Williams, 552.

Same—Discovery Shaft—Location of, Within Claim.

2. The fact that the discovery shaft of a quartz lode mining claim, sunk ten feet deep as required by statute, was partly within the boundaries of an adjoining patented claim, was immaterial where it appeared that its opening was within the boundaries of the former, and that the portion of the shaft within the confines of the claim was of such dimensions that a miner could work in it, and was in reality a shaft sunk upon the locator's own ground.—Nichols et al. v. Williams, 552.

Same—Pleadings—Amendments—Discretion.

3. Plaintiffs' location was made in 1905, that of defendant in 1906. At the trial of an adverse suit, in 1908, defendant asked leave to file a supplemental answer, alleging that plaintiffs had neglected to do the representation work on the claim in controversy, for the year 1907. The court refused permission to file it. *Held*, that it not appearing that defendant claimed to have initiated any rights subsequent to 1906, and his brief on appeal not disclosing any argument as to the materiality of the evidence sought to be introduced under the supplemental answer, there was no abuse of discretion in the court's action.—Nichols et al. v. Williams, 552.

MISJOINDER.

See Pleading and Practice, 24, 25.

MISTAKE.

See Account Stated, 3-6; Clerical Error.

MORTALITY TABLES.

See Evidence, 19.

MORTGAGES.

Mortgagors and Mortgagees—Transactions Between—How Viewed.

1. Where the relation of mortgagor and mortgagee has once been established, any subsequent arrangement by which the mortgagor's equity of

was revocable at the pleasure of the licensor or his successor in interest.—Prentice v. McKay et al., 114.

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Mortgagors and Mortgagees—Transactions Between—How Viewed.

1. Where the relation of mortgagor and mortgagee has once been established, any subsequent arrangement by which the mortgagor's equity of

redemption is sought to be transferred to the mortgagee will be viewed with distrust, and the original relationship of mortgagor and mortgagee held to exist unless it clearly appears that the transaction was perfectly fair and that no advantage was taken of the mortgagor by reason of his indebtedness.—Gassert v. Strong et al., 18.

Trustee and *Cestui Que Trust*—Transactions Between—Burden of Proof.

2. Where, in addition to mortgages to secure indebtedness, absolute deeds to the property were delivered as further security, the relationship of trustee and *cestui que trust* arose between the debtor and creditor, and the burden was cast upon defendant in an action assailing the *bona fides* of the transaction, to show that, when the *cestui que trust* relinquished his rights to defendant, the transaction was fair, that an adequate consideration was paid, that there was no fraud or concealment, and that the *cestui que trust* acted with full information relative to the status of the property. The presumption is against the transaction.—Gassert v. Strong et al., 18.

MOTION IN ARREST OF JUDGMENT.

See Criminal Law, 18.

MOTIONS.

Appeal—Review.

1. Where a motion is made upon several grounds, and the order granting it is general in its terms, the order will be sustained on appeal if it can be upon any of the grounds of the motion.—In re Fleming's Estate, 57.

MUNICIPAL CORPORATIONS.

Personal Injuries—Defective Sidewalks—Complaint—Insufficiency.

1. A complaint in an action against a city for damages alleged to have been sustained by reason of a defective sidewalk, which merely stated that the city had negligently placed the sidewalk in an unsafe, dangerous and defective condition and permitted it to remain so, but failed to specify in what respect the walk was unsafe, dangerous or defective, did not state facts sufficient to show negligence on the part of the city. The allegation amounted to bare legal conclusion of the pleader.—Pullen v. City of Butte, 194.

Police Commission Act—Policemen—Extending Term of Office—Constitution—Provision Inapplicable.

2. Section 31 of Article V of the Constitution, which declares that no law shall extend the term of any public officer, etc., does not apply to the provision of the Act of 1907 (Laws 1907, p. 344, creating a police commission in cities and towns), that an officer then serving on the force may be reappointed, such appointment to hold during good behavior or until the incumbent shall become incapacitated—thus practically insuring to such officer an indeterminate tenure—since prior to his appointment under the provisions of the Act, he is obliged to pass an examination and serve a probationary period of six months, the same as any other applicant of such a position.—State ex rel. Quintin v. Edwards, 250.

Same—"Special Commission"—Constitutional Provision Inapplicable.

3. The Act establishing a police commission in cities and towns (Laws 1907, p. 344) does not violate section 36, Article V of the Constitution, declaring that the legislature shall not delegate to any special commission power to make, supervise or interfere with any municipal improvement, etc., or perform any municipal function whatever. The board thus created, *held*, not to be a "special commission"

within the meaning of this section of the Constitution.—State ex rel. Quintin v. Edwards, 250.

Status of Policemen—State Officers.

4. A policeman is not a state officer. He is a public officer in the sense that he has certain duties to perform other than those strictly pertaining to the government of the municipality for which he is acting.—State ex rel. Quintin v. Edwards, 250.

Policemen—"Municipal" Officers—Servants—Employees.

5. Strictly speaking, a policeman is not a "municipal" officer—that is, a "city" officer—as that term is used in section 16, Article VI of the state Constitution, declaring that the legislative assembly may provide for the election and appointment of such municipal officers as public convenience may require, but that their term of office shall not in any case exceed two years; nor is such officer a mere servant or employee of the municipality.—State ex rel. Quintin v. Edwards, 250.

Same—Removal—Powers of Mayor.

6. *Held*, that section 14 of the Act establishing a police commission in cities and towns, which repeals all Acts and parts of Acts in conflict with the provisions of the legislation, and then declares that nothing therein contained shall abridge any of the powers possessed by the mayor under any other provision of law or any ordinance, does not reserve to the mayor the power of suspension and removal he theretofore possessed under section 3250, Revised Codes, but takes from him such right.—State ex rel. Quintin v. Edwards, 250.

License Taxes—Statutes—Constitutionality.

7. *Held*, that House Bill 203 enacted into law in 1897 (Laws 1897, p. 203 [sec. 3259, Revised Codes]) authorizing cities and towns *inter alia* to impose a license tax upon professions and occupations, is not open to the constitutional objection that it was not passed as required by section 24, Article V of the Constitution, declaring that on final passage of a bill the vote shall be taken by ayes and noes and the names of those voting entered in the journal.—Johnson v. City of Great Falls et al., 369.

Same—Power of Cities and Towns—Police Regulations.

8. While the legislature may not confer upon cities and towns the right to impose a license tax upon professions and occupations for the purpose of *raising revenue*, it may, in the absence of constitutional limitation, authorize them to impose such a tax in aid of *police regulations*.—Johnson v. City of Great Falls et al., 369.

Dentistry—Subject to Police Regulation.

9. *Held*, that the practice of dentistry is a proper subject for police regulations.—Johnson v. City of Great Falls et al., 369.

Police Power—Concurrent Exercise by State and Municipalities.

10. *Obiter:* The police power may be exercised concurrently by the state and a municipality.—Johnson v. City of Great Falls et al., 369.

Police Regulations—Dentistry—Cities and Towns—Limit of Power.

11. The power of a city or town to impose a license tax upon the right to practice the profession of dentistry as a police regulation, does not imply the power to refuse to license and thus to prohibit the pursuit of the profession.—Johnson v. City of Great Falls et al., 369.

Cities and Towns—Occupation Licenses—Power to Impose.

12. Section 4, Article XII of the Constitution, which, in empowering cities and towns to assess and collect taxes, deals with revenue and taxation exclusively, does not impliedly deny the power to such municipalities to impose license taxes in furtherance of police regulations.—Johnson v. City of Great Falls et al., 369.

Personal Injuries—Ordinances—Scope.

13. A municipal ordinance which, though a grant of a franchise to defendant telephone company, provided generally that, whenever it was necessary for any electric light or power wire to approach or cross telephone or telegraph wires, the same should not approach or cross such wires at a distance of less than four feet, was applicable alike to defendant electric power company, and its violation was *prima facie* negligence.—Mize v. Rocky Mt. Bell Tel. Co. et al., 521.

MURDER.

See Criminal Law, 15-17, 26-42, 44-56.

NEGLIGENCE.

See Personal Injuries.

NEW TRIAL.

Conflicting Evidence—Review.

1. Where the finding of the jury is based on irreconcilably conflicting evidence, it and the judgment of the trial court in denying a motion for a new trial, upon a review of the evidence, will not be disturbed on appeal.—Kaufman v. Cooper et al., 6.

Verdict Contrary to Evidence—Incorrect Assignment.

2. The statement in a motion for a new trial in a personal injury action, that the evidence showed that plaintiff knew, or in the exercise of reasonable care should have known, of the existence of a defect by reason of which she was injured and was therefore guilty of contributory negligence, and hence that the verdict in her favor was contrary to the law, as correctly declared by the court in its charge, did not present the question whether the evidence was insufficient to sustain a verdict in her favor, but the question whether the jury reached the proper conclusion under the instructions given.—Fearon v. Mullins, 45.

Same.

3. Where the jury found on conflicting evidence in favor of plaintiff, upon the issue of contributory negligence, in a personal injury action, and the instructions were submitted in proper form to meet the respective hypotheses of both parties, their verdict cannot be said to have been contrary to law in this respect.—Fearon v. Mullins, 45.

Notice—Service and Filing—Presumptions.

4. Unless the contrary appears affirmatively from the record on appeal, it will be presumed that a notice of intention to move for a new trial was served and filed in time; the burden of showing the contrary rests upon the party claiming that it was not.—State ex rel. Cohn v. District Court et al., 119.

Motion "Upon Minutes of Court"—Practice.

5. Under section 6795, Revised Codes, the district court may, upon a motion for a new trial made "upon the minutes of the court," take into consideration all the pleadings, records, minute entries and the evidence offered at the trial; and from the entire cases thus presented, determine the motion; and if the judge can remember the evidence and proceedings sufficiently to enable him to pass upon the motion, it is not necessary that the stenographer's notes of the trial proceedings be transcribed.—State ex rel. Cohn v. District Court et al., 119.

Remission of Portion of Verdict—Power of Court.

6. The district court has power to grant a new trial unless the successful party remit a portion of the judgment.—State ex rel. Cohn v. District Court et al., 119.

Same—Presumptions.

7. In the absence of the evidence from the record, it will be presumed that the action of the court in ordering a new trial unless remission of all but $225 of a $3,600 judgment be agreed to by the successful party, was fully justified.—State ex rel. Cohn v. District Court et al., 119.

Certiorari—Jurisdiction.

8. *Certiorari* does not lie to review an order granting a new trial, where the district court had jurisdiction to hear the motion.—State ex rel. Cohn v. District Court et al., 119.

Bill of Exceptions—Certificate—Misnomer—Effect.

9. A bill of exceptions in support of a motion for a new trial was prepared in conformity with the requirements of the Act of 1907 (Laws 1907, p. 89), was entitled and served as such, and opposing counsel in acknowledging service designated it as a bill of exceptions, and, after service, offered and had incorporated in it certain amendments. It was submitted to the judge as a bill of exceptions, and the certificate referred to the document as being "allowed, settled and signed as and for a true and correct copy of the proceedings of the trial," etc. In the certificate of settlement, however, counsel for movant designated the document as a "statement on motion for new trial." *Held* that, under the circumstances, the mere misnomer of the document was not sufficient ground for striking the bill from the record on appeal.—Robinson v. Helena L. & Ry. Co., 222.

Conflicting Evidence—Discretion.

10. Where the evidence is conflicting, a motion for a new trial on the ground of insufficiency of the evidence to sustain the verdict is addressed to the sound legal discretion of the trial court.—Garwood v. Corbett et al., 364.

Insufficiency of Evidence—Duty of Court.

11. If, on motion for a new trial, the court concludes that the verdict is not supported by the evidence, it is its duty to set it aside.—Garwood v. Corbett et al., 364.

Excessive Verdict—Remission of Excess.

12. Where the jury returned a verdict for plaintiff for more than double the amount he was entitled to recover under the most favorable aspect of his testimony—thus evincing bias and prejudice—the trial court properly granted a new trial, and was not obliged to refuse a retrial in case plaintiff consented to a remission of the excess.—Garwood v. Corbett et al., 364.

Conflicting Instructions.

13. The giving of conflicting instructions, the one correct and the other incorrect, upon a material point, will necessitate a reversal of the judgment and the granting of a new trial.—Helena Power Transmission Co. v. McLean, 388.

Grounds—Failure of Proof—Variance.

14. While technically there is a distinction between "variance" and "failure of proof," yet where the term "failure of proof" is used as the equivalent of "insufficiency of evidence" there may not be any distinction, and where the evidence tends to establish a cause of action entirely different from that alleged in the complaint, there is such a variance as amounts to a failure of proof, and the question may be presented on a motion for a new trial under a specification of insufficiency of the evidence to justify the verdict.—Forsell v. Pittsburgh & Mont. Copper Co., 403.

NONAPPEALABLE ORDERS.

See Appeal and Error, 27.

NONRESIDENTS.

Service of summons on,—see Summons, 1, 3.

NOTICE.

Entry of Judgment.

1. *Held*, that the entry of judgment is one of the "subsequent proceedings" mentioned in section 7149, Revised Codes, of which a defeated party or his attorney is entitled to notice.—State ex rel. Cohn v. District Court et al., 119.

Same—Service by Mail—When Insufficient.

2. Service of a notice upon an attorney can be made through the mail, only in the event that his place of residence is not known; therefore, where the location of both the office and residence of an attorney was known to opposing counsel, their notice to him, through the mail, of the entry of a judgment, was insufficient.—State ex rel. Cohn v. District Court et al., 119.

Same—Defective Service—Not Cured by Actual Receipt of Notice.

3. Since the notice mentioned in the foregoing paragraph was not a legal notice, i. e., one served according to law, the actual receipt of the letter notifying the attorney upon whom service was thus sought to be made, of the entry of judgment, was not effective, and his notice of intention to move for a new trial, served and filed after the lapse of ten days from receipt of the letter, was timely.—State ex rel. Cohn v. District Court et al., 119.

New Trial—Service and Filing—Presumptions.

4. Unless the contrary appears affirmatively from the record on appeal, it will be presumed that a notice of intention to move for a new trial was served and filed in time; the burden of showing the contrary rests upon the party claiming that it was not.—State ex rel. Cohn v. District Court et al., 119.

Service—Deficiency in Law—Supervisory Control.

5. Appeals being only allowed under such regulations as may be prescribed by law (Constitution, Article VIII, section 15), and the law not having made provision for the appointment, temporarily, of some one upon whom service of notice of an appeal from an order granting a new trial could be made in place of an adverse party who had died after the order was made, the supreme court, on application for writ of supervisory control, looking to the annulment of the order, cannot grant relief. The deficiency in the law in this respect can be supplied only by legislative, not judicial, action.—State ex rel. Cohn v. District Court et al., 119.

OFFER OF PROOF.

Exclusion, when harmless error,—see Evidence, 20.

Exclusion—When Proper.

1. In a prosecution for homicide, an offer of proof, some matters contained in which were competent and others incompetent because hearsay, was properly excluded as a whole.—State v. Hanlon, 557.

OFFICE AND OFFICERS.

1. Policemen, status of,—see Municipal Corporations, 4, 5.
2. Statute extending term of,—see Constitution, 1.

ORDERS.

Nonappealable,—see Appeal and Error, 27.

ORDINANCES.

See Municipal Corporations, 13.

PARTIES.

See Conversion, 1; Partnership, 3.

PARTNERSHIP.

Executory Agreement of Partnership—Larceny by Bailee.

1. While partners cannot commit larceny of the funds or property of the partnership, this immunity does not attach so long as the partnership agreement is executory only and the conditions of the agreement remain unfulfilled.—State v. Brown, 309.

Same.

2. Defendant and the prosecuting witness entered into an agreement to engage as partners in a business venture, the former furnishing the experience and the latter the means. The complaining witness turned over certain sums of money to defendant for the purpose of obtaining a license, purchasing supplies, etc., who thereupon appropriated the money to his own use and absconded. *Held*, that the contract of partnership was never executed, but that defendant repudiated it by his conduct, and thus became the bailee of his prospective partner.—State v. Brown, 309.

Action by Partners in Individual Names.

3. In the absence of express statutory authority permitting an action to be brought in the name of a copartnership, a suit involving a partnership claim was properly instituted in the names of the persons composing the partnership.—Wilson et al. v. Yegen Bros. et al., 504.

Fictitious Name—Statutory Provisions—Disability to Sue—Waiver.

4. Where the fact that plaintiffs were copartners did not appear from the face of the complaint, and the objection that they had no legal capacity to sue inasmuch as they were doing business under a fictitious name and had failed to file the certificate required by section 5504, Revised Codes, was not taken by answer (*Id.*, sec. 6538), defendants will be deemed to have waived the objection; and the fact that they did not know that plaintiffs were partners until after one of their witnesses had testified to that effect was immaterial, since it was not too late then to ask leave to amend the answer so as to raise the question.—Wilson et al. v. Yegen Bros. et al., 504.

Same—What does not Constitute.

5. The firm name of "A. & B.," used to designate a copartnership composed of two individuals, is not a fictitious name or a designation not showing the names of the persons interested as partners.—Wilson et al. v. Yegen Bros. et al., 504.

Same—Failure to File Certificate—Evidence—Admissibility.

6. In an action on a *quantum meruit* to recover for materials furnished and work done, the substituted defendants claimed that the amount sued for was due to a third person against whom they had unsatisfied judgments, which they thus sought to collect. The evidence showed that the judgment debtor, who had been acting as foreman for plaintiffs, had no interest whatever in the subject of the suit. *Held*, that defendants could not complain of a ruling of the district court refusing to permit them to show that plaintiffs had failed to file the certificate required to

be filed by partners doing business under a fictitious name; the defeat of plaintiffs' claim on this ground would not have aided defendants, who could recover only by showing that the money sued for belonged to the judgment debtor.—Wilson et al. v. Yegen Bros. et al., 504.

Quantum Meruit—Pleading.

7. In an action upon a *quantum meruit* for work done and materials furnished, properly brought by plaintiffs in their individual names, it was not necessary to allege that the cause of action accrued to them as copartners.—Wilson et al. v. Yegen Bros. et al., 504.

PERSONAL INJURIES.

Master and Servant—Complaint—Sufficiency.

1. The complaint of a domestic servant against her employer in an action for personal injuries, sustained while in the performance of her duties by reason of a fall into an opening on a porch, which alleged in substance that the plaintiff was required to perform a part of her work on the porch; that, when injured, she was at work there by personal direction of defendant; that the cover over the hole was insufficient to sustain the weight of a person; that the cover concealed the opening; that all of this was known to defendant but unknown to plaintiff, and that defendant negligently failed to inform her of the existence of the opening, was sufficient, both as to its allegation of defendant's negligence and its causal connection with the injury, to withstand attack by general demurrer or an objection to the introduction of evidence.—Fearon v. Mullins, 45.

Same—Evidence—Striking Out—Error.

2. In answer to a question how the opening referred to in the foregoing paragraph was situated, defendant answered that it was at the end of the porch, and that it was not necessary for a person going over the porch for a certain purpose to go near it. *Held*, that it was error to strike out the latter clause of the answer as not responsive to the question, it having been a natural explanation of the preceding portion thereof.—Fearon v. Mullins, 45.

Health—Opinion Evidence—Discretion.

3. The question of the competency of a layman to give his opinion as to the state of plaintiff's health prior to a personal injury for which damages are sought, is one left to the sound judgment of the trial judge, subject to review only in case of a clear abuse of discretion.—Fearon v. Mullins, 45.

Same—Opinion Evidence—Competency.

4. A lay witness who had known plaintiff for six years and had seen her frequently during that time, was competent to testify as to her health prior to a personal injury; and the mere fact that he stated that it "is" good, instead of using the past tense of the verb, did not render his testimony incompetent, where it was obvious that he intended to do so.—Fearon v. Mullins, 45.

New Trial—Verdict Contrary to Evidence—Incorrect Assignment.

5. The statement in a motion for a new trial in a personal injury action, that the evidence showed that plaintiff knew, or in the exercise of reasonable care should have known, of the existence of a defect by reason of which she was injured and was therefore guilty of contributory negligence, and hence that the verdict in her favor was contrary to the law, as correctly declared by the court in its charge, did not present the question whether the evidence was insufficient to sustain a verdict in her favor, but the question whether the jury reached the proper conclusion under the instructions given.—Fearon v. Mullins, 45.

Contributory Negligence—Verdict Contrary to Law.

6. Where the jury found on conflicting evidence in favor of plaintiff, upon the issue of contributory negligence, in a personal injury action, and the instructions were submitted in proper form to meet the respective hypotheses of both parties, their verdict cannot be said to have been contrary to law in this respect.—Fearon v. Mullins, 45.

View of Premises by Jury—Verdict—Conclusiveness.

7. The evidence in the above action having been conflicting and the premises where the accident occurred viewed by the jury, they were the exclusive judges to determine the facts, and with their determination in favor of plaintiff and the court's action in denying a new trial, the supreme court will not interfere on appeal.—Fearon v. Mullins, 45.

Master and Servant—Safe Place to Work—Reasonable Care—Question for Jury.

8. The question whether defendants exercised reasonable care in providing plaintiff employee a safe place in which to work, where it appears that he was injured by the sticking of a cage in a mining shaft, the defect in which was known to defendant superintendent, and where there were other shafts which could have been used in safely lowering workmen into and hoisting them from the workings, was properly submitted to the jury, even though it was shown that the superintendent spared neither pains nor money to keep the shaft in running order.—Hagerty v. Montana Ore Pur. Co. et al., 69.

Same—Negligence of Agent—Liability for Injury—Concurring Causes.

9. If defendant mining superintendent's negligence in maintaining a defective shaft and, with knowledge of its dangerous condition, permitting its use for lowering and hoisting workmen, was a concurring cause of plaintiff employee's injury by reason of such defect, he was not relieved from liability merely because the negligence or incompetency of the engineer in charge of the engine operating the cage may have contributed to the injury.—Hagerty v. Montana Ore Pur. Co. et al., 69.

Same — Principal and Agent — Nonfeasance — Misfeasance — Liability of Agent.

10. The term "nonfeasance" refers to an agent's omission to perform a duty which he owes to his principal by virtue of the agency and for which he is responsible to his principal only; but, whenever the agent's omission consists of failure to perform a duty which he owes to third persons, then, as to such persons, his omission is "misfeasance" for which he is responsible.—Hagerty v. Montana Ore Pur. Co. et al., 69.

Same.

11. The conduct of a superintendent of a mine who had the same control of his company's property as the company would have had, had it been a natural person and attending to the management as such, in negligently maintaining a defective shaft and permitting its use by employees unaware of its dangerous condition, amounted, not to nonfeasance, but to misfeasance, for injury to an employee on account of which he was liable where his negligence, combined with that of the engineer in charge, was found by the jury to have been the proximate cause of the accident.—Hagerty v. Montana Ore Pur. Co. et al., 69.

Same—Negligence of Agent—Concurring Cause—Question for Jury.

12. Whether the defendant superintendent's negligence, as set forth in the preceding paragraph, was a proximate cause of the employee's injury, where the negligence or incompetency of the engineer operating the hoisting engine also contributed to the happening of the accident, was a question of fact properly submitted to the jury.—Hagerty v. Montana Ore Pur. Co. et al., 69.

Master and Servant—Assumption of Risk—Pleadings.

13. In order to make the defense of assumption of risk available to defendant in a personal injury action, it must be specially pleaded.—Longpre v. Big Blackfoot Milling Co., 99.

Same—Negligence of Fellow-servant—Pleadings.

14. The defense that the injury complained of by a servant was the result of the negligence of a fellow-servant, being of the same nature as that of assumption of risk, must also be specially pleaded before defendant master can avail himself of it.—Longpre v. Big Blackfoot Milling Co., 99.

Same.

15. The rule that the defense of negligence of a fellow-servant must be specially pleaded is subject to the same limitations as that of assumption of risk and contributory negligence, to-wit, that, if the facts alleged in the complaint show that the servant was at fault, the pleading is demurrable, and also that, if the facts proven by plaintiff at the trial raise a presumption of contributory negligence on his part, he may be nonsuited, whether the defense is pleaded or not.—Longpre v. Big Blackfoot Milling Co., 99.

Same—Contributory Negligence—Conflicting Evidence—Question for Jury.

16. Where, in an action by a laborer for damages for personal injuries alleged to have been suffered by reason of the breaking of the stock of a cant-hook, used to move logs, the evidence was conflicting as to whether plaintiff was guilty of contributory negligence in subjecting the appliance to unusual or unnecessary strain, the question was properly submitted to the jury.—Longpre v. Big Blackfoot Milling Co., 99.

Same—Appliances—Duty to Inspect—Question for Jury—Instructions.

17. While it is the duty of the master, after having provided the servant with reasonably safe and suitable appliances with which to work, to inspect them both at the time of furnishing them, and during the course of the employment to discover defects in them, such duty of inspection is not absolute; it does not require him to inspect appliances, simple in construction, which do not in themselves involve the element of danger; hence, an instruction that defendant was absolutely bound to inspect or cause to be inspected a cant-hook, used for moving logs, before it was delivered to plaintiff for use, was erroneous. The question whether it was defendant's duty to inspect it was for the jury to determine.—Longpre v. Big Blackfoot Milling Co., 99.

Defect of Construction—Knowledge of Master—Complaint.

18. Where from the complaint in an action to recover damages for the death of a servant claimed to have been due to the negligence of the master, it appears that an alleged defect in a way, made use of by the defendant's employees, was a defect of construction, an allegation of the employer's knowledge of the defect is not required.—Hollingsworth v. Davis-Daly Estates Copper Co., 143.

Same.

19. An allegation that defendant's employer negligently permitted a way over an abandoned shaft to become unsafe and dangerous, and negligently left the ground around the shaft loose, unstable, and of inadequate cohesiveness to sustain the weight of an ordinary man, and negligently put good boards across the timbers, thereby inviting the deceased to cross over, was a sufficient averment that defendant had notice of the dangerous condition of the shaft.—Hollingsworth v. Davis-Daly Estates Copper Co., 143.

Same—Evidence—Admissibility.

20. Evidence that steam was injected through an exhaust pipe into an abandoned shaft, alleged to have been insufficiently timbered and the ground surrounding it negligently "left loose" by defendant com-

pany, and in walking over which an employee was killed by falling into it, was properly admitted under the allegations of the complaint. The effect of steam on the loose ground was competent to be shown.—Hollingsworth v. Davis-Daly Estates Copper Co., 143.

Same—Opinion Evidence—Admissibility.

20a. A miner, who had testified that he examined the shaft the morning after the deceased fell into it, and could see no evidence of any timbering, was properly allowed to answer a question whether, from his knowledge based upon such examination, he could say whether any timbers were beneath the collar of the shaft on the day before the accident.—Hollingsworth v. Davis-Daly Estates Copper Co., 143.

Same—Evidence—Custom.

21. The inquiry whether the method pursued by defendant company in making loose dirt and decomposed granite secure around the abandoned shaft, was the one commonly used in the community, was not objectionable.—Hollingsworth v. Davis-Daly Estates Copper Co., 143.

Same—Children of Legal Age—Pecuniary Loss by Death of Parent—Instructions.

22. Section 6486, Revised Codes, not limiting the right of recovery for the death of a parent, to minors, it was for the jury to say, under the evidence, whether the children of the deceased, both of legal age, suffered damage through the death of their father, and what sum would compensate them; and an instruction to the effect that the jury in arriving at their verdict could not consider any loss of comfort, society or protection of the father was correctly refused.—Hollingsworth v. Davis-Daly Estates Copper Co., 143.

Same—Knowledge of Defect by Servant—Instructions.

23. In an action to recover for the death of a servant by reason of the negligence of the master in failing to provide him with a safe place in which to work, the question is not whether the deceased had equal means with the master of knowing the conditions existing, but whether, in the light of all the surrounding circumstances, he appreciated the danger; and therefore the refusal of the court to submit an instruction that if the servant had equal means of knowledge with the defendant of the danger, he was guilty of contributory negligence and assumed the risk, was proper.—Hollingsworth v. Davis-Daly Estates Copper Co., 143.

Cities and Towns—Defective Sidewalks—Complaint—Insufficiency.

24. A complaint in an action against a city for damages alleged to have been sustained by reason of a defective sidewalk, which merely stated that the city had negligently placed the sidewalk in an unsafe, dangerous and defective condition and permitted it to remain so, but failed to specify in what respect the walk was unsafe, dangerous or defective, did not state facts sufficient to show negligence on the part of the city. The allegation amounted to a bare legal conclusion of the pleader.—Pullen v. City of Butte, 194.

Street Railways—Immaterial Variance.

25. Where in a personal injury action against a street railway company the complaint alleged that plaintiff in attempting to board a street-car was injured by the car suddenly moving *forward*, and the evidence revealed the fact that he was thrown from the car by a *backward* movement, and it did not appear that defendant was misled or its counsel surprised by this technical departure in the proof, the court properly overruled a motion for a new trial on the alleged ground of variance. (Revised Codes, sec. 6585.)—Robinson v. Helena L. & Ry. Co., 222.

Simple Negligence—Complaint—Waiver of Defect.

26. Where the complaint in an action for personal injuries, after stating a cause of action for simple negligence, contained a paragraph

characterizing the conduct of defendant as "willful" and reckless (which clause might have been omitted without affecting the cause of action theretofore stated), thus by the use of the word "willful" injecting an element of ambiguity and indefiniteness into the pleading, defendant, by answering, waived this defect; and, plaintiff not having introduced any evidence tending to furnish ground for an inference of wanton or willful wrong, a motion for nonsuit on the ground that the evidence, showing ordinary negligence only, did not support an allegation of intentional injury, was properly denied.—Robinson v. Helena L. & Ry. Co., 222.

Complaint—Willful Negligence—Proof of Simple Negligence.

27. *Obiter:* An allegation in a complaint in an action to recover damages for personal injuries that the wrong was willful or wanton will not support recovery upon proof of simple negligence only.—Robinson v. Helena L. & Ry. Co., 222.

Street Railways—Carrier and Passenger—Evidence—Insufficiency.

28. Defendant street railway company operated an electric line from a city to a point outside the city limits, where it had erected a platform for the convenience of passengers from and at which to board and leave the cars. Plaintiff, with knowledge that the car he was about to board was not in its proper place at the platform, undertook to do so from a direction where he could not be seen and without notice to the motorman or conductor. In doing so he was thrown from the car by a sudden movement to its place at the platform, and injured. *Held,* that, under these circumstances, the relationship of carrier and passenger was not established, and that defendant owed plaintiff no duty until its employees had notice of his presence.—Robinson v. Helena L. & Ry. Co., 222.

Same—Platforms—Failure of Passenger to Use—Effect.

29. Where one about to board a street-car outside of the city limits fails to make use of a platform provided by the carrier for the means of ingress and egress of passengers to and from its cars, and he is injured, he cannot recover, since the high degree of watchfulness which the carrier must exercise toward passengers is not due to those who do not avail themselves of the means provided for accepting the invitation extended by the carrier to take passage, but adopt means of their own choice.—Robinson v. Helena L. & Ry. Co., 222.

Mortality and Annuity Tables—Conclusiveness—Evidence—Erroneous Instruction.

30. An instruction charging the jury, unqualifiedly, in a personal injury action, that they could award to plaintiff such an amount as would purchase an annuity equal to the difference between what he could have earned if he had not been injured, and what he could earn in his injured condition was erroneous. While standard mortality and annuity tables are competent evidence in such cases, they are not conclusive guides to the jury in awarding damages. In having recourse to them a variety of circumstances should be considered, such as advancing age and consequent diminished earning capacity, plaintiff's health, habits, etc.—Robinson v. Helena L. & Ry. Co., 222.

Personal Injuries—Negligence—Evidence.

31. Negligence must be shown; it will not be presumed.—Reino v. Montana Min. L. Dev. Co., 291.

Master and Servant—Mines—Negligence—Evidence—Insufficiency.

32. Plaintiff, a miner, while working at the bottom of a mining shaft, was injured by a bucket, used for hoisting waste, falling upon him. The evidence merely showed that the bucket had been hanging over the shaft and that the boxing on one end of the drum around which the cable attached to the bucket ran, having become loose, the en-

gineer removed it preparatory to remedying the defect, and that thereupon the brake holding the drum stationary released its hold and the bucket fell. The evidence failed to show that the engineer ought reasonably to have anticipated that the removal of the boxing from the drum would cause the brake to be released and the bucket to be precipitated down the shaft. *Held*, under the rule that negligence is the proximate cause of an accident only where it is such that a person of ordinary intelligence should have foreseen that injury was likely to be caused by his act or omission, that the evidence failed to establish negligence on the part of the engineer.—Reino v. Montana Min. L. Dev. Co., 291.

Same—*Res Ipsa Loquitur*—Inapplicability of Maxim.

33. Under the circumstances recited in the foregoing paragraph, the maxim, "*Res ipsa loquitur*," had no application.—Reino v. Montana Min. L. Dev. Co., 291.

Same—Duty of Master—Erroneous Instruction.

34. An instruction that the servant has the right to presume, and to act upon such presumption, that defendant master would at all times use ordinary care to *protect* the plaintiff, etc., placed too great a burden upon the master, since the latter is only bound to use reasonable care to provide a reasonably safe place in which to work, reasonably safe appliances with which to perform his duties, and reasonably competent fellow-servants with whom to work.—Reino v. Montana Min. L. Dev. Co., 291.

Relation of Master and Servant—Complaint—Sufficiency.

35. Where the gravamen of the complaint in an action to recover damages from an electric power company for the death of a carpenter, employed by it to make repairs in and about its power station, was that defendant failed in its duty to use ordinary care to furnish deceased a reasonably safe place in which to work, allegations that deceased had been "employed and hired" by defendant, and was "engaged in the performance of his duty under his employment," etc., were sufficient to show that the relation of master and servant existed between defendant and deceased.—Poor v. Madison River P. Co. et al., 341.

Independent Contractors—Servants.

36. The superintendent of an electric power company engaged a carpenter to do certain work about the company's power station, and directed the latter to secure another workman to help him. The understanding was that they were to be paid by the hour. The officers of the company pointed out what work was required and the company furnished the materials. The general plans were those of defendant company, and the workmen submitted themselves to the control of the company and its officers in all the details of the work. *Held*, that the carpenters were servants and not independent contractors.—Poor v. Madison River P. Co. et al., 341.

Vice-principal—Fellow-servants.

37. The superintendent of an electric power company in charge of its power station and of the improvements and alterations being made thereon at the time plaintiff's intestate, a carpenter, was killed by coming in contact with an uninsulated wire, was a vice-principal and not a fellow-servant.—Poor v. Madison River P. Co. et al., 341.

Contributory Negligence—Complaint—Sufficiency.

38. The complaint in an action to recover damages for the death of an employee of an electric power company, which alleged that decedent, a carpenter, was engaged in the performance of his duty; that he accidentally lost his footing, and in an attempt to prevent his falling, and not knowing that a wire was charged with electricity, threw his arm over it; that he was inexperienced with electric wires, did not know that

the wire was charged with electricity and that the place where he was working was unsafe because of the danger of his coming in contact with wires; that defendants had knowledge of the danger and negligently failed to inform decedent thereof, sufficiently showed the latter's freedom from negligence in the doing of the act which caused his death, and a formal allegation that he was free from contributory negligence was not necessary.—Poor v. Madison River P. Co. et al., 341.

Same—Extraordinary Danger—Assumption of Risk.

39. A servant does not assume the risk of extraordinary danger of which he has no knowledge or appreciation.—Poor v. Madison River P. Co. et al., 341.

Same—Knowledge of Defendant—Complaint—Sufficiency.

40. The complaint mentioned in paragraph 38 above, also *held* sufficient in its statement of facts showing wherein the danger consisted, and the causal connection between the defective place and the injury, as well as that the defendants had knowledge of the efficient cause of the injury, or, by the exercise of reasonable diligence, ought to have had such knowledge.—Poor v. Madison River P. Co. et al., 341.

Evidence—Contributory Negligence—Insufficiency.

41. Where a carpenter accidentally slipped on a scaffolding in an electric power station, and in doing so threw his arm over a wire heavily charged with electricity, evidence held not to justify a holding that, as a matter of law, deceased was guilty of contributory negligence.—Poor v. Madison River P. Co. et al., 341.

Electricity—Assumption of Risk.

42. A carpenter who, while working about the power station of an electric power company, had been informed by the superintendent in charge that there was no danger in working around the electric wires, and who, on the strength of such statement, walked over and crawled up around them while engaged in his work and was subsequently killed by coming in contact with one of them, did not assume the risk of danger from the wires.—Poor v. Madison River P. Co. et al., 341.

Directed Verdict—Error.

43. *Held*, that the district court erred in directing a verdict in favor of defendant electric company, in an action to recover damages for the negligent killing of one of its employees.—Poor v. Madison River P. Co. et al., 341.

Storekeepers—Dangerous Premises—Complaint—Sufficiency.

44. The rule that one who by his own act has brought personal injury upon himself must allege in his complaint that he exercised reasonable care and prudence (*Kennon* v. *Gilmer*, 4 Mont. 433), does not apply where the injury was sustained while plaintiff was going into a place which he was invited to enter, by some hidden or unknown cause of the existence of which it was the duty of defendant, who had control of the place, to give him warning.—Montague v. Hanson, 376.

Same—Duty to Customers.

45. A storekeeper owes to persons who, in response to an invitation to purchase goods, come to his store, the duty to exercise ordinary care to keep his premises safe, as well as to warn them of any hidden or lurking danger thereon.—Montague v. Hanson, 376.

Same—Trapdoors—Duty of Defendant.

46. Plaintiff, who, upon entering a store for the purpose of trading, fell into an open and unguarded cellarway which he did not see and of the danger incident to which defendant owner did not apprise him, could, in entering, act upon the assumption that defendant had done his duty to keep the premises safe, and was under no obligation to keep a constant watch to avoid danger.—Montague v. Hanson, 376.

Same—Evidence—Contributory Negligence—Negligence of Defendant.

47. Evidence *held* sufficient to justify the jury in finding that plaintiff's injury, sustained in falling into an open cellarway in defendant's store, was not due to his contributory negligence, and that defendant storekeeper was negligent in not warning plaintiff of the existence of the danger.—Montague v. Hanson, 376.

Same—Reasonableness of Verdict.

48. Where plaintiff, a farmer sixty-eight years of age, sustained a dislocated shoulder by a fall into an open cellarway in a public store, was disabled from thereafter attending to his business, and suffered much physical pain, a verdict in his favor for $941.70 was not excessive.—Montague v. Hanson, 376.

Same—Earning Capacity—Lack of Evidence—Motion to Withdraw from Jury—Refusal—Harmless Error.

49. Where plaintiff failed to introduce evidence touching his loss of earning capacity, the denial of a motion to withdraw from the jury the question of damages sustained on that account, while error, was nonprejudicial, in view of an instruction, subsequently given, which accomplished the same purpose.—Montague v. Hanson, 376.

Inability to Pursue Established Course of Life—Element of Damage.

50. Merely because the earning capacity of plaintiff, a farmer sixty-eight years old, may have been so small as to be a negligible element in making up the estimate of the damages which he could recover, he was none the less entitled to compensation for the destruction of his capacity to pursue his established course of life—an element distinct from loss of earning capacity.—Montague v. Hanson, 376.

Same—Refusal of Instruction—Nonprejudicial Error.

51. The court having instructed the jury that defendant storekeeper was only bound to use ordinary care, and that, if they found that he had discharged the obligation resting upon him to warn plaintiff of the existence of the open cellarway, they should find for defendant, its action in refusing to charge that the mere fact that the cellarway was open for the purpose of obtaining goods from the basement did not constitute negligence *per se*, was not prejudicial error. While the instruction might well have been given, the jury must have understood that the mere existence of the trapdoor could not convict the defendant of negligence.—Montague v. Hanson, 376.

Master and Servant—Complaint—Evidence—Admissibility.

52. Where, in an action against a mining company, plaintiff employee alleged that his injury was due to defendant's negligence in permitting a brake on a hoisting engine to be in a defective condition, so that it would not perform the duty assigned it, it was error to admit evidence that the brake was too light; that the engine was defective; that the exhaust from the engine was not properly connected, and of the effect of the back pressure of steam. The plaintiff must stand upon the cause of action stated in the complaint.—Forsell v. Pittsburgh & Mont. Copper Co., 403.

Same.

53. It was also error to admit evidence, under the complaint referred to in the foregoing paragraph, that a kind of brake different from the one used should have been employed, since no charge was made that defendant was negligent in selecting the one employed, nor that the one used was not adapted to the work required of it.—Forsell v. Pittsburgh & Mont. Copper Co., 403.

Same—Concurrent Negligence—Failure of Proof.

54. The complaint in a personal injury action charged that the defendant mining company negligently permitted a brake on a hoisting

engine to become defective, and that such negligence, concurring with the negligence of the engineer in charge of the engine, "both acting together proximately caused the injury," and that but for such concurrent negligence the accident would not have occurred. At the close of plaintiff's case, the court granted a nonsuit as to the defendant engineer, thus determining as a matter of law that he was not guilty of actionable negligence. *Held*, that plaintiff was required to prove his case as made in the complaint; and that, since he failed to show concurrent negligence, there was a failure of proof, which prevented recovery.—Forsell v. Pittsburgh & Mont. Copper Co., 403.

Complaint—Contributory Negligence.

55. In a personal injury action the plaintiff need not allege his freedom from contributory negligence; its presence is a matter of defense.—Schroder v. Montana Iron Works, 474.

Same.

56. When the complaint in an action to recover damages for personal injuries alleges facts from which, by fair interpretation, negligence on the part of plaintiff, which was a proximate cause of the injury, must be inferred, it is demurrable unless the pleading alleges further facts showing that plaintiff was nevertheless acting with due care.—Schroder v. Montana Iron Works, 474.

Master and Servant—Complaint—Assumption of Risk.

57. If the facts stated in the complaint of a servant in an action to recover damages from the master on account of personal injuries, fairly support the conclusion that plaintiff assumed the risk, the pleading must be held not to state a cause of action.—Schroder v. Montana Iron Works, 474.

Same—Assumption of Risk—Extraordinary Danger.

58. Beyond the ordinary risks of his employment, the servant does not assume any risk, except by express agreement or where the circumstances are such that he must be presumed to have done so from the fact that he continued in the employment, though the extraordinary danger was known to him or was so obvious that he must be presumed to have had knowledge of it.—Schroder v. Montana Iron Works, 474.

Same.

59. A servant has a right to presume that the employer's duty to use ordinary care to furnish him reasonably safe and suitable appliances has been observed; hence his duty is to yield instant obedience in the use of them, and he will not be held to have assumed the risk of any injury of an unusual danger incident to such use, unless he knew of it, or it was so obvious that he must be presumed to have observed it.—Schroder v. Montana Iron Works, 474.

Same—Assumption of Risk—Complaint—Sufficiency.

60. Plaintiff was injured while in the employ of defendant company as a teamster, through the breaking of a chain by means of which a heavy iron casting was being lifted from his wagon. The complaint alleged that the chain was wholly insufficient and unsafe, in that it was not of sufficient size to hold or bear the weight of the casting, all of which was known to defendant but of which plaintiff was ignorant. *Held*, that the allegation was not demurrable as importing that plaintiff had, or should have had, knowledge that the chain's tensile strength was not sufficient to bear the weight of the casting, and that he, therefore, assumed the risk of the danger incident to the weakness of the chain.—Schroder v. Montana Iron Works, 474.

Same—Contributory Negligence—Complaint—Sufficiency.

61. Nor was the complaint demurrable as showing that plaintiff was guilty of contributory negligence in going so near to the suspended casting as to be hurt by its fall; it was necessary for him to do so in

order to release the chain and thus to complete the task assigned him, and he had a right to assume that the chain would not break.—Schroder v. Montana Iron Works, 474.

Survival Statutes—Nature of.

62. A survival statute presupposes the existence of a cause of action in favor of the deceased; it does not create a new cause of action, but carries forward and preserves to his heirs or representatives the right which deceased had before his demise.—Dillon v. Great Northern Ry. Co., 485.

Railroad Employees—Death by Negligence—Fellow-servant Act—Construction—Survival Statute.

63. *Held*, that Chapter 1 of the Session Laws of 1905 (Laws 1905, p. 1 [Revised Codes, sections 5251, 5252]), which provides in section 1 that railroad companies shall be liable for all damages sustained by any of their employees because of the neglect, willful wrongs, etc., of fellow-servants, and in section 2 that in case of the death of any such employee in consequence of any injury so sustained, the right of action shall survive and may be prosecuted and maintained by his heirs or personal representatives, is a survival statute, and does not create a new cause of action in favor of the heirs for damages sustained by them by reason of the death of deceased.—Dillon v. Great Northern Ry. Co., 485.

Same—Instantaneous Death—Survival of Action.

64. Where in an action brought by the heirs of a railroad employee, under the provisions of Chapter 1, Laws of 1905, p. 1 (Revised Codes, sections 5251, 5252), to recover damages for the alleged wrongful killing of deceased, the agreed statement of facts showed that his death in a collision was instantaneous, there could not be any survival of an action in the heirs, since, the wrong and the death of decedent having been coincident in point of time, no cause of action ever accrued in his favor, and therefore none could survive in the heirs.—Dillon v. Great Northern Ry. Co., 485.

Death by Negligence—Complaint—Insufficiency.

65. Where, in an action against a mining company and a railroad company to recover damages for the negligent killing of a person while walking on or crossing the latter defendant's track, which action was based upon the alleged fault of the former in allowing steam from its plant to be so exhausted as to obscure the track, and upon the negligent failure of the employees of the latter to give warning of an approaching train, it was impossible to ascertain from the allegations of the complaint at what place the accident occurred, where the track was enveloped in steam, whether deceased was in the steam on the track when killed, or at a place where miners were in the habit of crossing the track in going to or coming from work, a demurrer to the pleading was properly sustained.—Lynch v. Great Northern Ry. Co., 511.

Same—Railroad Crossings—Duty to Give Signals.

66. If deceased was not on a public crossing when struck by defendant railroad company's train, but several hundred feet away from it, the failure of its employees to give warning of the approaching train did not constitute a breach of any duty which the company owed him.—Lynch v. Great Northern Ry. Co., 511.

Same—Complaint—Insufficiency.

67. The allegation in the complaint that it was the duty of defendant railroad company to refrain from wantonly killing a human being on its track and, in order to observe said duty, to give warning of an approaching train, was insufficient to put the defendant in the wrong, in the absence of the further allegation that it had not observed the duty, or that deceased was in a place where its observance would have enabled him to escape injury.—Lynch v. Great Northern Ry. Co., 511.

Electricity—Death by Negligence—Duty of Defendants—Care Required.

68. Plaintiff's intestate was killed while working in a field, some ten miles from a city, by coming in contact with a fence wire which had been charged with a dangerous current of electricity by means of a high tension wire of an electric power company, which, in falling upon a telephone wire in the streets of the city, charged the latter, and it in turn transferred the current through a guy wire to the fence wire. Defendant telephone and electric power companies contended that they did not owe any duty to deceased. *Held*, that they were bound to use reasonable care to prevent the crossing of their respective wires and the consequent diversion of the dangerous current into means of transmission with which persons rightfully about their business might come in contact.—Mize v. Rocky Mt. Bell Tel. Co. et al., 521.

Negligence—Proximate Cause.

69. The "proximate cause" of an injury is that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which the injury would not have occurred.—Mize v. Rocky Mt. Bell Tel. Co. et al., 521.

Electricity—Proximate Cause.

70. To break the chain of sequence between defendants' negligence in permitting their wires to come in contact, and the death of plaintiff's intestate, so as to relieve them from its consequences, it was necessary for the accident to have been such a one as could not reasonably have been anticipated by them; and to hold them liable it was not necessary to show that they ought to have foreseen the particular injury which did result, but if it appeared that they ought to have anticipated that *some* accident was likely to happen as the reasonable and natural consequence of their negligence, it was sufficient.—Mize v. Rocky Mt. Bell Tel. Co. et al., 521.

Same.

71. Defendant companies were chargeable with knowledge that an electric current will go wherever there is a metallic substance to conduct it, and therefore should have foreseen that serious injury might reasonably be expected to result to one coming in contact with a telephone wire charged with a highly dangerous current of electricity, or with one leading from it.—Mize v. Rocky Mt. Bell Tel. Co. et al., 521.

Same—Railroad Rights of Way—Trespassers.

72. Though a railroad company may not alienate its right of way or any part of it so as to interfere with the full performance of the functions of the railway, it may grant a license for the construction of an irrigating ditch over a portion of it; therefore deceased, who was killed while cleaning out a ditch constructed under such a grant, through contact with a fence wire charged with electricity as detailed in paragraph 68 above, was not a trespasser to whom defendants owed no duty.—Mize v. Rocky Mt. Bell Tel. Co. et al., 521.

Same—Measure and Elements of Damages—Instructions.

73. Under section 6486, Revised Codes, providing that "such damages may be given as under all the circumstances of the case may be just," evidence relative to the marital relations existing between plaintiff and her intestate up to the time of his death was permissible; and the court did not err in charging the jury that in estimating the damages plaintiff was entitled to, they might take into consideration, as an element of such damages, the pecuniary loss of the widow on account of being deprived of the comfort, protection, society and companionship of her husband.—Mize v. Rocky Mt. Bell Tel. Co. et al., 521.

Same—Pleadings—Causes of Action—Form of Verdict.

74. Where the complaint in an action to recover damages for the negligent killing of a person stated but a single cause of action, though

drawn in four separate counts specifying separately the acts of negligence relied upon, a verdict finding the issues in favor of plaintiff "on each and all of the four causes of action set forth in the complaint" was in effect a general verdict and sufficient; while the pleading was defective and the verdict unusual in form, defendants' rights could not have been prejudicially affected by either.—Mize v. Rocky Mt. Bell Tel. Co. et al., 521.

Same—Municipal Ordinances—Scope.

75. A municipal ordinance which, though a grant of a franchise to defendant telephone company, provided generally that, whenever it was necessary for any electric light or power wire to approach or cross telephone or telegraph wires, the same should not approach or cross such wires at a distance of less than four feet, was applicable alike to defendant electric power company, and its violation was *prima facie* negligence.—Mize v. Rocky Mt. Bell Tel. Co. et al., 521.

Same—Different Acts of Negligence—Proof.

76. Plaintiff was not required to prove every act of negligence charged in her complaint; having proved to the satisfaction of the jury facts sufficient to show that the negligence of defendants directly caused the death of her intestate, she was entitled to recover.—Mize v. Rocky Mt. Bell Tel. Co. et al., 521.

PLEADING AND PRACTICE.

See, also, Criminal Law.

Pleadings—General Denial—Matters Admissible Under.

1. Since in claim and delivery, wherein plaintiff relies on general allegations of ownership and right of possession, a general denial puts in issue both the right of property and the right of possession, as well as all other material allegations of the complaint, and under it defendant may give in evidence any special matters which will defeat plaintiff's claim, the court did not err in permitting defendants, in an action wherein plaintiff sought to recover possession of a stock of merchandise theretofore delivered by him to another to be sold, with an option to purchase, and afterward by the latter placed in the hands of defendants under the same agreement, to abandon their special plea by which they claimed under a sale from their predecessor, and proceed under their general denial.—Kaufman v. Cooper et al., 6.

Constructive Trusts—Fraud—Complaint—Sufficiency.

2. A complaint in an action to have one of several defendants declared trustee *ex maleficio* for plaintiff's benefit, for an alleged conspiracy to defraud the latter out of his property, examined, and *held* to state a cause of action.—Gassert v. Strong et al., 18.

Personal Injuries—Master and Servant—Complaint—Sufficiency.

3. The complaint of a domestic servant against her employer in an action for personal injuries, sustained while in the performance of her duties by reason of a fall into an opening on a porch, which alleged in substance that the plaintiff was required to perform a part of her work on the porch; that, when injured, she was at work there by personal direction of defendant; that the cover over the hole was insufficient to sustain the weight of a person; that the cover concealed the opening; that all of this was known to defendant but unknown to plaintiff, and that defendant negligently failed to inform her of the existence of the opening, was sufficient, both as to its allegation of defendant's negligence and its causal connection with the injury, to withstand attack by general demurrer or an objection to the introduction of evidence.—Fearon v. Mullins, 45.

Real Property—Wrongful Occupation and Detention—Mesne Profits—Damages Recoverable.

4. In an action for the wrongful occupation and detention of real property, the rental value thereof during the time of such wrongful occupation was provable as an element of damages, under an allegation that the "reasonable value of the rents and profits for the use and occupation of the premises" was a certain sum; section 6069, Revised Codes, providing that "the detriment caused by the wrongful occupation of real property is deemed to be the value of the use of the property for the time of such occupation," etc.—Leyson v. Davenport et al., 62.

Account Stated—Complaint—Burden of Proof.

5. One who seeks to avoid a settlement of accounts, the result of which was an account stated, and open up to investigation the antecedent dealings between the parties, must allege the error, fraud or mistake on which he relies, and the burden of establishing such allegation by clear and satisfactory evidence is upon him.—Johnson v. Gallatin Valley Milling Co., 83.

Personal Injuries—Master and Servant—Assumption of Risk—Pleadings.

6. In order to make the defense of assumption of risk available to defendant in a personal injury action, it must be specially pleaded.—Longpre v. Big Blackfoot Milling Co., 99.

Same—Negligence of Fellow-servant—Pleadings.

7. The defense that the injury complained of by a servant was the result of the negligence of a fellow-servant, being of the same nature as that of assumption of risk, must also be specially pleaded before defendant master can avail himself of it.—Longpre v. Big Blackfoot Milling Co., 99.

Same.

8. The rule that the defense of negligence of a fellow-servant must be specially pleaded is subject to the same limitations as that of assumption of risk and contributory negligence, to-wit, that, if the facts alleged in the complaint show that the servant was at fault, the pleading is demurrable, and also that, if the facts proven by plaintiff at the trial raise a presumption of contributory negligence on his part, he may be nonsuited, whether the defense is pleaded or not.—Longpre v. Big Blackfoot Milling Co., 99.

New Trial—Motion "Upon Minutes of Court"—Practice.

9. Under section 6795, Revised Codes, the district court may, upon a motion for a new trial made "upon the minutes of the court," take into consideration all the pleadings, records, minute entries and the evidence offered at the trial, and from the entire case thus presented, determine the motion; and if the judge can remember the evidence and proceedings sufficiently to enable him to pass upon the motion, it is not necessary that the stenographer's notes of the trial proceedings be transcribed.—State ex rel. Cohn v. District Court et al., 119.

Personal Injuries—Master and Servant—Defect of Construction—Knowledge of Master—Complaint.

10. Where from the complaint in an action to recover damages for the death of a servant claimed to have been due to the negligence of the master, it appears that an alleged defect in a way, made use of by the defendant's employees, was a defect of construction, an allegation of the employer's knowledge of the defect is not required.—Hollingsworth v. Davis-Daly Estates Copper Co., 143.

Same.

11. An allegation that defendant's employer negligently permitted a way over an abandoned shaft to become unsafe and dangerous, and negligently left the ground around the shaft loose, unstable, and of inadequate cohesiveness to sustain the weight of an ordinary man, and

negligently put good boards across the timbers, thereby inviting the deceased to cross over, was a sufficient averment that defendant had notice of the dangerous condition of the shaft.—Hollingsworth v. Davis-Daly Estates Copper Co., 143.

"Commencement" of Action—Demurrer—Proper Amendment—Relation Back to Original Pleading—Statute of Limitations.

12. An action is "commenced" within the meaning of section 6457, Revised Codes, and the operation of the statute of limitations is thereby arrested, by filing a complaint to which a general demurrer is afterward sustained, provided the pleading is sufficiently substantial to allow of its being properly amended so as to fully state the same cause of action attempted to be stated in the first instance.—Clark v. Oregon Short Line R. R. Co., 177.

Personal Injuries—Cities and Towns—Defective Sidewalks—Complaint—Insufficiency.

13. A complaint in an action against a city for damages alleged to have been sustained by reason of a defective sidewalk, which merely stated that the city had negligently placed the sidewalk in an unsafe, dangerous and defective condition and permitted it to remain so, but failed to specify in what respect the walk was unsafe, dangerous or defective, did not state facts sufficient to show negligence on the part of the city. The allegation amounted to a bare legal conclusion of the pleader.—Pullen v. City of Butte, 194.

Justices' Courts—Pleadings—Reply.

14. A reply is not one of the pleadings which may be filed in a justice's court.—Mettler v. Adamson et al., 194.

Practice—Appeal from Justices' Courts to District Courts—Record on Appeal to Supreme Court—How Made up.

15. The record on appeal to the supreme court in an action brought to the district court from a justice's court must be made up as in cases originating in the district court, and it is not necessary that the whole record be embodied in a bill of exceptions.—Mettler v. Adamson et al., 194.

Personal Injuries—Simple Negligence—Complaint—Waiver of Defect.

16. Where the complaint in an action for personal injuries, after stating a cause of action for simple negligence, contained a paragraph characterizing the conduct of defendant as "willful" and reckless (which clause might have been omitted without affecting the cause of action theretofore stated), thus by the use of the word "willful" injecting an element of ambiguity and indefiniteness into the pleading, defendant, by answering, waived this defect; and, plaintiff not having introduced any evidence tending to furnish ground for an inference of wanton or willful wrong, a motion for nonsuit on the ground that the evidence, showing ordinary negligence only, did not support an allegation of intentional injury, was properly denied.—Robinson v. Helena L. & Ry. Co., 222.

Same—Complaint—Willful Negligence—Proof of Simple Negligence.

17. *Obiter:* An allegation in a complaint in an action to recover damages for personal injuries that the wrong was willful or wanton will not support recovery upon proof of simple negligence only.—Robinson v. Helena L. & Ry. Co., 222.

Instructions—Review—Bill of Exceptions—Practice.

18. Since the adoption of section 6746, Revised Codes (Laws 1907, p. 62), the whole charge, or such parts of it as will illustrate the point upon which the objecting party relies as error in the charge, as well as instructions requested and refused, should be incorporated in a bill of exceptions to insure review on appeal.—Robinson v. Helena L. & Ry. Co., 222.

Personal Injuries—Relation of Master and Servant—Complaint—Sufficiency.

19. Where the gravamen of the complaint in an action to recover damages from an electric power company for the death of a carpenter, employed by it to make repairs in and about its power station, was that defendant failed in its duty to use ordinary care to furnish deceased a reasonably safe place in which to work, allegations that deceased had been "employed and hired" by defendant, and was "engaged in the performance of his duty under his employment," etc., were sufficient to show that the relation of master and servant existed between defendant and deceased.—Poor v. Madison River P. Co. et al., 341.

Same—Contributory Negligence—Complaint—Sufficiency.

20. The complaint in an action to recover damages for the death of an employee of an electric power company, which alleged that decedent, a carpenter, was engaged in the performance of his duty; that he accidentally lost his footing, and in an attempt to prevent his falling, and not knowing that a wire was charged with electricity, threw his arm over it; that he was inexperienced with electric wires, did not know that the wire was charged with electricity and that the place where he was working was unsafe because of the danger of his coming in contact with wires; that defendants had knowledge of the danger and negligently failed to inform decedent thereof, sufficiently showed the latter's freedom from negligence in the doing of the act which caused his death, and a formal allegation that he was free from contributory negligence was not necessary.—Poor v. Madison River P. Co. et al., 341.

Same—Knowledge of Defendant—Complaint—Sufficiency.

21. The complaint mentioned in paragraph 20 above, also *held* sufficient in its statement of facts showing wherein the danger consisted, and the causal connection between the defective place and the injury, as well as that the defendants had knowledge of the efficient cause of the injury, or, by the exercise of reasonable diligence, ought to have had such knowledge.—Poor v. Madison River P. Co. et al., 341.

Same—Dangerous Premises—Complaint—Sufficiency.

22. The rule that one who by his own act has brought personal injury upon himself must allege in his complaint that he exercised reasonable care and prudence (*Kennon* v. *Gilmer*, 4 Mont. 433), does not apply where the injury was sustained while plaintiff was going into a place which he was invited to enter, by some hidden or unknown cause of the existence of which it was the duty of defendant, who had control of the place, to give him warning.—Montague v. Hanson, 376.

Conversion—Exemplary Damages—Complaint—Sufficiency.

23. The complaint in an action for damages for a conversion which alleged, *inter alia*, that defendants "did unlawfully, maliciously, fraudulently and oppressively take and carry away" the property in controversy, and refused restitution of the same after repeated demands, was broad enough to warrant inquiry into the motives and behavior of defendants, and to justify the giving of an instruction that exemplary damages might be awarded for oppressively, fraudulently or maliciously withholding the chattels after demand.—Shandy v. McDonald et al., 393.

Causes of Action—Misjoinder—Waiver.

24. The objection that there is a misjoinder of causes of action must be made by answer or demurrer; if not so made, it is deemed waived.—Forsell v. Pittsburgh & Mont. Copper Co., 403.

Same—Waiver—Election.

25. Where the objection to a misjoinder of causes of action was waived, an order refusing to compel plaintiff to elect on which cause of action he would proceed was proper.—Forsell v. Pittsburgh & Mont. Copper Co., 403.

Statute of Limitations—Pleading—Waiver.

26. Under section 6475, Revised Codes, the question whether an action is barred by the statute of limitations can be raised only by answer. The defense may be waived by failure to interpose it.—State ex rel. Kolbow v. District Court, 415.

Personal Injuries—Complaint—Contributory Negligence.

27. In a personal injury action the plaintiff need not allege his freedom from contributory negligence; its presence is a matter of defense. Schroder v. Montana Iron Works, 474.

Same.

28. When the complaint in an action to recover damages for personal injuries alleges facts from which, by fair interpretation, negligence on the part of plaintiff, which was a proximate cause of the injury, must be inferred, it is demurrable unless the pleading alleges further facts showing that plaintiff was nevertheless acting with due care.—Schroder v. Montana Iron Works, 474.

Same—Master and Servant—Complaint—Assumption of Risk.

29. If the facts stated in the complaint of a servant in an action to recover damages from the master on account of personal injuries, fairly support the conclusion that plaintiff assumed the risk, the pleading must be held not to state a cause of action.—Schroder v. Montana Iron Works, 474.

Same—Assumption of Risk—Complaint—Sufficiency.

30. Plaintiff was injured while in the employ of defendant company as a teamster, through the breaking of a chain by means of which a heavy iron casting was being lifted from his wagon. The complaint alleged that the chain was wholly insufficient and unsafe, in that it was not of sufficient size to hold or bear the weight of the casting, all of which was known to defendant but of which plaintiff was ignorant. *Held*, that the allegation was not demurrable as importing that plaintiff had, or should have had, knowledge that the chain's tensile strength was not sufficient to bear the weight of the casting, and that he, therefore, assumed the risk of the danger incident to the weakness of the chain.—Schroder v. Montana Iron Works, 474.

Same—Contributory Negligence—Complaint—Sufficiency.

31. Nor was the complaint demurrable as showing that plaintiff was guilty of contributory negligence in going so near to the suspended casting as to be hurt by its fall; it was necessary for him to do so in order to release the chain and thus to complete the task assigned him, and he had a right to assume that the chain would not break.—Schroder v. Montana Iron Works, 474.

Partnership—Action by Partners in Individual Names.

32. In the absence of express statutory authority permitting an action to be brought in the name of a copartnership, a suit involving a partnership claim was properly instituted in the names of the persons composing the partnership.—Wilson et al. v. Yegan Bros. et al. 504.

Same—*Quantum Meruit*—Pleading.

33. In an action upon a *quantum meruit* for work done and materials furnished, properly brought by plaintiffs in their individual names, it was not necessary to allege that the cause of action accrued to them as copartners.—Wilson et al. v. Yegan Bros. et al., 504.

Personal Injuries—Death by Negligence—Complaint—Insufficiency.

34. Where, in an action against a mining company and a railroad company to recover damages for the negligent killing of a person while walking on or crossing the latter defendant's track, which action was based upon the alleged fault of the former in allowing steam from its plant to be so exhausted as to obscure the track, and upon the negligent

failure of the employees of the latter to give warning of an approaching train, it was impossible to ascertain from the allegations of the complaint at what place the accident occurred, where the track was enveloped in steam, whether deceased was in the steam on the track when killed, or at a place where miners were in the habit of crossing the track in going to or coming from work, a demurrer to the pleading was properly sustained.—Lynch v. Great Northern Ry. Co., 511.

Same—Complaint—Insufficiency.

35. The allegation in the complaint that it was the duty of defendant railroad company to refrain from wantonly killing a human being on its track and, in order to observe said duty, to give warning of an approaching train, was insufficient to put the defendant in the wrong, in the absence of the further allegation that it had not observed the duty, or that deceased was in a place where its observance would have enabled him to escape injury.—Lynch v. Great Northern Ry. Co., 511.

Estates of Deceased Persons—Conveyances—Petition—Sufficiency.

36. A petition, filed pursuant to the provisions of section 7614, Revised Codes, for an order requiring an administrator to convey real property as per a contract entered into between decedent and petitioner, which set forth the contract at length and alleged an adequate consideration for it, was sufficient; it was not necessary that it contain all the essential averments of a bill in equity for the specific performance of a contract.—In re Grogan's Estate, 540.

Pleadings—Common-law Counts—Inapplicable Under Code Practice.

37. Plaintiff, under a common-law count for money had and received, sought to show fraud on the part of defendants. The court held the testimony inadmissible, for the reason that the facts relied upon to show fraud were not set forth in the complaint. *Held*, that, since under section 6532, Revised Codes, the complaint must contain a statement of the facts constituting the cause of action, in ordinary and concise language, and the common law has no application where the law is declared by the code (section 8060), the ruling of the court was correct.—Truro et al. v. Passmore et al., 544.

POLICE COMMISSION LAW.

See Municipal Corporations, 2-6.

POLICEMEN.

See Municipal Corporations, 2-6.

POLICE POWER.

See Municipal Corporations, 8, 9.

PRESUMPTIONS.

Of innocence,—see Criminal Law, 56.

Account Stated—Estoppel.

1. A settlement of accounts between two parties does not create an estoppel, but furnishes a strong *prima facie* presumption that the result thus reached is correct.—Johnson v. Gallatin Valley Milling Co., 83.

New Trial—Notice—Service and Filing.

2. Unless the contrary appears affirmatively from the record on appeal, it will be presumed that a notice of intention to move for a new trial was served and filed in time; the burden of showing the contrary rests upon the party claiming that it was not.—State ex rel. Cohn v. District Court et al., 119.

Same—Remission of Portion of Verdict.

3. In the absence of the evidence from the record, it will be presumed that the action of the court in ordering a new trial unless remission of all but $225 of a $3,600 judgment be agreed to by the successful party, was fully justified.—State ex rel. Cohn v. District Court et al., 119.

PRINCIPAL AND AGENT.

Nonfeasance—Misfeasance—Liability of Agent.

1. The term "nonfeasance" refers to an agent's omission to perform a duty which he owes to his principal by virtue of the agency and for which he is responsible to his principal only; but, whenever the agent's omission consists of failure to perform a duty which he owes to third persons, then, as to such persons, his omission is "misfeasance" for which he is responsible.—Hagerty v. Montana Ore Pur. Co. et al., 69.

Authority of Agent—Sale of Land.

2. The authority of an agent to sell land must be in writing.—Schaeffer v. Mutual Benefit L. Ins. Co., 459.

Same—Dealing with Special Agent.

3. A person dealing with a special agent is bound at his peril to ascertain the scope of the agent's authority.—Schaeffer v. Mutual Benefit L. Ins. Co., 459.

Sale of Real Estate—Special Agent—Unauthorized Act—Receipt of Partial Payment—Liability of Principal.

4. Plaintiff entered into negotiations with defendant company, through its agent, for the purchase of real estate. The latter had no general authority to sell the premises, but had to submit every proposition to his principal before acting upon it. This the plaintiff knew. Before a contract had been actually entered into, plaintiff paid to the agent $5,000 as part of the purchase price. After such payment the deal was declared off by defendant company, the parties having been unable to agree upon the terms of sale. All but $1,000 was returned by the agent to plaintiff, who brought suit against the company to recover that sum. *Held*, that, the agent having been a special one, plaintiff was bound at his peril to ascertain the former's authority, that the agent exceeded his authority in accepting the partial payment, that his receipt of the sum mentioned was not the receipt by his principal, and that plaintiff could not recover from the latter.—Schaeffer v. Mutual Benefit L. Ins. Co., 459.

PRINCIPAL AND SURETY.

See, also, Landlord and Tenant.

Obligation of Sureties—How Construed.

1. While it is true that, in the absence of statute, the obligation of a surety is *strictissimi juris*, in this state the statutes covering the subject must control.—Dodd v. Vucovich, 188.

PROBATE PROCEEDINGS.

Estates—Partial Distribution—Questions not Determinable.

1. *Held*, on appeal from an order sustaining objections to a petition for *partial* distribution of an estate, filed pursuant to the provisions of section 7669, Revised Codes, that the questions of heirship, amount of distributive share claimed, etc., cannot be determined in a proceeding brought under that section; this may only be done as provided by sections 7670-7672, Revised Codes, or upon *final* distribution of the estate. In re Fleming's Estate, 57.

Same—Real Property—Sale—Petition—Statutes—Substantial Compliance.

2. A petition for the sale of real estate of a decedent, which complies substantially with the provisions of section 7562, Revised Codes, prescribing what such paper shall contain, is sufficient.—Plains Land & Improvement Co. et al. v. Lynch et al., 271.

Same—Petition for Sale—Contents—Jurisdiction.

3. *Held*, that the requirement of section 7562, Revised Codes, that the *condition* and *value* of the real estate of a deceased person shall be set forth in a petition to sell such real property to pay debts, is not jurisdictional; and that, upon a collateral attack, defects in the petition with reference to such matters will not operate to set aside the proceedings had on the petition for leave to sell, after the sale has been made and the purchaser has, in good faith, paid the purchase price and gone into possession of the land sold.—Plains Land & Improvement Co. et al. v. Lynch et al., 271.

Same—Defective Petition—Sale—Collateral Attack.

4. A petition to sell real estate of a decedent, which in its statement as to the *condition* thereof was so defective as to amount to an entire omission in this regard, and which as to its value set forth that it had been "appraised at the sum of $2,000" (which appraisement was had less than one year prior to the presentation of the petition), was not so defective as to render the sale void on a collateral attack, in an action to quiet title brought by heirs of the estate.—Plains Land & Improvement Co. et al. v. Lynch et al., 271.

Same—Minute Entry—Evidence—Signature of Judge—Surplusage.

5. An entry in the minute-book required to be kept by section 7701, Revised Codes, for probate proceedings, of an order to show cause why real estate of a deceased person should not be sold, as asked by a petition filed for that purpose, was sufficient evidence of the fact that the order was duly made, and the act of the clerk in signing the judge's name to the entry did not render it incompetent as evidence. The signature was surplusage.—Plains Land & Improvement Co. et al. v. Lynch et al., 271.

Same—Order of Sale—Omission of Terms—Cured by Confirmation.

6. Where real estate of a deceased person was sold, on the petition of the administratrix, for cash and for considerable more than its appraised value, and the court after a full hearing confirmed the sale, the failure of the order of sale to state the terms thereof was cured by such confirmation.—Plains Land & Improvement Co. et al. v. Lynch et al., 271.

Same—Order of Sale—Clerical Error—Effect.

6a. The petition for an order of sale of the real estate of a decedent, consisting of one parcel of land, the notices of sale, the order of confirmation and the deed correctly described the land to be sold, as being situated in range "26," etc. In the order of sale (which referred to the petition), however, it was described as located in range "25." The land was sold, the deed delivered, the purchase price paid, and the purchaser platted the land for city additions and had sold portions thereof to others, when certain of the heirs of the estate brought suit to quiet title, claiming, *inter alia*, that by reason of the misdescription of the land in the order, the sale was void. *Held*, that taking into consideration all the records in the proceedings leading up to the sale, the substitution of the figures "25" for "26" in the order of sale was a clerical error, and that under the circumstances disclosed the sale should not, on collateral attack, be declared void for such error.—Plains Land & Improvement Co. et al. v. Lynch et al., 271.

Same—Irregularities—Errors Within Jurisdiction—Review.

7. Where the district court had jurisdiction to make an order of sale of a decedent's real estate, and the order itself was not void, any defects in the proceedings leading up to the sale were errors within jurisdiction, subject to review on appeal in the probate proceedings only, and not open to collateral attack by heirs seeking to set aside the sale for errors which amounted only to irregularities in the proceedings, and which, under section 7625, Revised Codes, must be disregarded.—Plains Land & Improvement Co. et al. v. Lynch et al., 271.

Same—Executors and Administrators—Conveyances—Petition — Sufficiency.

8. A petition, filed pursuant to the provisions of section 7614, Revised Codes, for an order requiring an administrator to convey real property as per a contract entered into between decedent and petitioner, which set forth the contract at length and alleged an adequate consideration for it, was sufficient; it was not necessary that it contain all the essential averments of a bill in equity for the specific performance of a contract.—In re Grogan's Estate, 540.

Same—Petition—Tender—When Unnecessary.

9. Petitioner having paid into the county treasury, for the use of the administrator, the last installment due on the contract above referred to, it was not necessary for him to make an actual tender of the balance still owing. The law does not require the doing of an idle thing.—In re Grogan's Estate, 540.

Same—Petition not Premature.

10. Prior to the time the last installment on the above contract became due, litigation involving the lands arose and a suit was commenced by others in the United States circuit court. Thereupon decedent and petitioner entered into a supplemental agreement that final payment should not be made until said action was finally determined *in said court*. The contention that the petition to convey was premature, inasmuch as an appeal may have been taken from the decree of the circuit court, *held* without merit, since the determination "in said court" meant in the circuit court, and not on appeal.—In re Grogan's Estate, 540.

PROCESS.

Infirmity in,—see Sheriffs, 1.

PUBLIC POLICY.

Real Property—Contract of Sale—Future Conveyance.

1. An agreement signed by one as administrator of an estate, and two others, to convey for a valuable consideration, at a future date, real estate not then owned by them, but belonging to the estate represented by the administrator, was not void as against public policy.—Lawson v. Cobban et al., 138.

Contracts—Construction.

2. Courts will not declare a contract void as against public policy, if by any reasonable construction it can be upheld.—Lawson v. Cobban et al., 138.

QUANTUM MERUIT.

See Partnership, 7.

QUIETING TITLE.

Tax Deeds—Suit in Equity.

1. An action brought by a land owner under the provisions of section 6870, Revised Codes, to quiet the title to premises sold for delinquent taxes, is one in equity.—Larson v. Peppard, 128.

Same—Condition Precedent to Maintaining Action.

2. *Held*, that the maxim, "He who seeks equity must do equity," applies in an action by a land owner to quiet title to land sold for de-

linquent taxes, and that, as a condition precedent to maintaining his action, the plaintiff will be required to pay to the tax deed holder the amount of taxes which plaintiff should have paid, even conceding that, by reason of irregularities, the sale did not divest the owner of title, and no action could have been maintained by the purchaser to recover back the amounts paid by him, and although the rule of *caveat emptor* applies to purchases at delinquent tax sales.—Larson v. Peppard, 128.

Same—Decree—Interest.

3. The action by the land owner above referred to, not having been one to redeem from a tax sale, the court erred in allowing interest at the rate of two per cent per month from the time the delinquent taxes were paid by defendant. Interest at the legal rate only was recoverable.—Larson v. Peppard, 128.

Same—Form of Decree.

4. The court decreed that the plaintiff land owner's title to land, sold for delinquent taxes, be quieted, subject to a lien in favor of defendant for the amounts paid by him. The better practice in a case of this kind *held* to be, for the court to enter an order requiring plaintiff to make payment to defendant of the sums paid by the latter, with interest, within a reasonable time, the decree quieting title to be made upon payment, otherwise relief of any kind whatever to be denied plaintiff.—Larson v. Peppard, 128.

RAILROADS.

See, also, Personal Injuries, 25-30, 62-67.

Rights of Way—Trespassers.

1. Though a railroad company may not alienate its right of way or any part of it so as to interfere with the full performance of the functions of the railway, it may grant a license for the construction of an irrigating ditch over a portion of it; therefore deceased, who was killed while cleaning out a ditch constructed under such a grant, through contact with a fence wire accidentally charged with electricity, was not a trespasser to whom defendants owed no duty.—Mize v. Rocky Mt. Bell Tel. Co. et al., 521.

REAL PARTY IN INTEREST.

See Conversion, 1.

REAL PROPERTY.

See, also, Landlord and Tenant; Principal and Agent, 2, 4; Probate Proceedings; Quieting Title.

Wrongful Occupation and Detention—Damages.

1. In an action for the wrongful occupation and detention of real property, the rental value thereof during the time of such wrongful occupation was provable as an element of damages, under an allegation that the "reasonable value of the rents and profits for the use and occupation of the premises" was a certain sum; section 6069, Revised Codes, providing that "the detriment caused by the wrongful occupation of real property is deemed to be the value of the use of the property for the time of such occupation," etc.—Leyson v. Davenport et al., 62.

Contract of Sale—Future Conveyance—Public Policy.

2. An agreement signed by one as administrator of an estate, and two others, to convey for a valuable consideration, at a future date, real estate not then owned by them, but belonging to the estate represented by the administrator, was not void as against public policy.—Lawson v. Cobban et al., 138.

REAL PROPERTY IN INTEREST.

See Conversion, 1.

REBUTTAL.

See Evidence, 18.

RECORD ON APPEAL.

See Appeal and Error, 15, 17, 18, 22, 25, 33, 34.

REHEARINGS.

Briefs—Assignments of Error—Failure to Argue.

1. Where counsel for appellant failed in their brief to argue assignments of error based upon the refusal of the court to give certain instructions, and merely stated therein that under the pleadings and facts in evidence they should have been given, thus leaving it to the supreme court to determine for itself wherein the trial court erred in refusing them, a petition for rehearing on the ground that in its decision the appellate court overlooked such assignments of error has no merit.—Kaufman v. Cooper et al., 16.

"RELATION BACK"—DOCTRINE OF.

See Waters and Water Rights, 9.

RES GESTAE.

See Evidence, 15.

RES IPSA LOQUITUR.

See Personal Injuries, 33.

REVENUE.

See License Taxes.

REVIEW.

See Appeal and Error.

ROBBERY.

See Criminal Law, 4-14.

RULES OF SUPREME COURT.

See Briefs, 3.

SERVICE.

See Notice; Summons.

SHERIFFS.

Attachment—Infirmity in Process—Effect.

1. Where a sheriff in levying upon property purported to act by virtue of a writ of attachment, infirmity in his process did not have the effect

of changing his official status, i. e., he acted officially, notwithstanding such infirmity, and not individually.—Gehlert v. Quinn, 1.

SIDEWALKS.

See Municipal Corporations, 1.

SPECIAL AGENTS.

See Principal and Agent, 3, 4.

SPECIFICATIONS OF ERROR.

See Briefs.

STATE OFFICERS.

Policemen are not,—see Municipal Corporations, 4.

STATUTE OF LIMITATIONS.

"Commencement" of Action—Demurrer—Proper Amendment—Relation Back to Original Pleading.

1. An action is "commenced" within the meaning of section 6457, Revised Codes, and the operation of the statute of limitations is thereby arrested, by filing a complaint to which a general demurrer is afterward sustained, provided the pleading is sufficiently substantial to allow of its being properly amended so as to fully state the same cause of action attempted to be stated in the first instance.—Clark v. Oregon Short Line R. R. Co., 177.

Pleading—Waiver.

2. Under section 6475, Revised Codes, the question whether an action is barred by the statute can be raised only by answer. The defense may be waived by failure to interpose it.—State ex rel. Kolbow v. District Court, 415.

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STATUTES AND STATUTORY CONSTRUCTION.

District Judges—Disqualifying Affidavits—Liberal Construction of Statute.

1. Section 6315, Revised Codes, providing for the disqualification of a district judge by the filing of an affidavit that the party making it has reason to believe, and does believe, that he cannot have a fair and impartial trial before such judge, because of the latter's bias or prejudice, should be liberally construed with a view to effect its object and promote justice.—Gehlert v. Quinn, 1.

Water Rights—Appropriation—Statutes—Apply to Public Lands Only.

2. Sections 4840-4891, Revised Codes, regulating the acquisition of the use of water by appropriation in this state, apply only to appro-

priations made on the public lands of the United States or of the state, and to such as are made by individuals who have riparian rights either as owners of riparian lands or through grants from such owners.—Prentice v. McKay et al., 114.

Entry of Judgment—Notice.

3. *Held,* that the entry of judgment is one of the "subsequent proceedings" mentioned in section 7149, Revised Codes, or which a defeated party or his attorney is entitled to notice.—State ex rel. Cohn v. District Court et al., 119.

Liberal Construction—Limitation.

4. While the provisions of the Codes should be liberally construed, such liberality should not be so far extended as to annul altogether specific provisions thereof.—State ex rel. Cohn v. District Court et al., 119.

Judgments—Motion to Set Aside—Statute Applicable to Judgments and Decrees.

5. There being no distinction between judgments at law and decrees in equity, except as to the character of relief granted by them, section 6589, Revised Codes, authorizing vacation of judgments fair on their face, within a reasonable time not exceeding six months, applies to both, subject to the rule that a court of equity will not interfere so long as there is another subsisting adequate remedy.—State ex rel. Happel v. District Court, 166.

Police Commission Act—Policemen—Extending Term of Office.

6. Section 31 of Article V of the Constitution, which declares that no law shall extend the term of any public officer, etc., does not apply to the provision of the Act of 1907 (Laws 1907, p. 344, creating a police commission in cities and towns), that an officer then serving on the force may be reappointed, such appointment to hold during good behavior or until the incumbent shall become incapacitated—thus practically insuring to such officer an indeterminate tenure—since prior to his appointment under the provisions of the Act, he is obliged to pass an examination and serve a probationary period of six months, the same as any other applicant for such a position.—State ex rel. Quintin v. Edwards, 250.

Same—"Special Commission"—Constitutional Provision Inapplicable.

7. The Act establishing a police commission in cities and towns (Laws 1907, p. 344) does not violate section 36, Article V of the Constitution, declaring that the legislature shall not delegate to any special commission power to make, supervise or interfere with any municipal improvement, etc., or perform any municipal function whatever. The board thus created, *held,* not to be a "special commission" within the meaning of this section of the Constitution.—State ex rel. Quintin v. Edwards, 250.

Same—Policemen—Removal—Powers of Mayor.

8. *Held,* that section 14 of the Act establishing a police commission in cities and towns, which repeals all Acts and parts of Acts in conflict with the provisions of the legislation, and then declares that nothing therein contained shall abridge any of the powers possessed by the mayor under any other provision of law or any ordinance, does not reserve to the mayor the power of suspension and removal he theretofore possessed under section 3250, Revised Codes, but takes from him such right.—State ex rel. Quintin v. Edwards, 250.

Title—Validity of Act.

9. That the title of an Act recites the purpose of the legislation at a greater length than necessary is not a valid objection to either the title or the Act.—State v. Ross, 319.

Single Object—How Determined—Surplusage.

10. The question whether a particular Act has but a single object or purpose in view must be determined, not from the title, but from the body of the Act itself; and, if it has but one, the legislation is not invalid on the ground of plurality of subjects even though the title recites more than one; the subject not contained in the Act being treated as surplusage.—State v. Ross, 319.

Gaming—Statute—Constitutionality.

11. *Held*, that the Act of 1907 prohibiting certain forms of gambling (Laws 1907, p. 287 [secs. 8416-8436, Revised Codes]) is not open to the constitutional objection (Article V, sec. 23) that it contains more than one subject.—State v. Ross, 319.

Same—Penalties—Civil Action for Money Lost—Validity of Statute.

12. The anti-gambling law (Laws 1907, p. 287 [Revised Codes, secs. 8416-8436]) was not rendered invalid by the insertion of section 15 (sec. 8430, Revised Codes), creating a right of action in favor of one losing at any of the prohibited games, to recover the amount lost, together with exemplary damages. The right thus given is in the nature of a penalty and constitutes a part of the penalty provided by the Act. The only limit placed by the Constitution upon the legislature in fixing punishments for crimes is that no excessive fines be imposed or cruel and unusual punishments inflicted.—State v. Ross, 319.

Legislative Procedure—Final Passage—Vote—Constitution.

13. After a bill has, on third reading, passed the house in which it originated, the vote being taken by ayes and noes and the names of those voting entered on the journal, as required by section 24, Article V of the Constitution, and is amended in the other house of the legislative assembly, and then returned to the first for action on the amendments, it is not necessary that the vote on the adoption of the amendments thus made be again taken by ayes and noes and the names entered on the journal.—Johnson v. City of Great Falls et al., 369.

Survival Statutes—Nature of.

14. A survival statute presupposes the existence of a cause of action in favor of the deceased; it does not create a new cause of action, but carries forward and preserves to his heirs or representatives the right which deceased had before his demise.—Dillon v. Great Northern Ry. Co., 485.

Fellow-servant Act—Construction—Survival Statute.

15. *Held*, that Chapter I of the Session Laws of 1905 (Laws 1905, p. 1 [Revised Codes, sections 5251, 5252]), which provides in section 1 that railroad companies shall be liable for all damages sustained by any of their employees because of the neglect, willful wrongs, etc., of fellow-servants, and in section 2 that in case of the death of any such employee in consequence of any injury so sustained, the right of action shall survive and may be prosecuted and maintained by his heirs or personal representatives, is a survival statute, and does not create a new cause of action in favor of the heirs for damages sustained by them by reason of the death of deceased.—Dillon v. Great Northern Ry. Co., 485.

STOREKEEPERS.

See Personal Injuries, 44-51.

STREET RAILWAYS.

See Personal Injuries, 25-30.

SUMMONS.

Service of Publication—Jurisdiction.

1. An action against a nonresident holding the legal title to corporate stock, in the possession of a third person in the state, to establish and enforce a trust therein, is one *quasi in rem*, and service by publication was sufficient to enable the district court to determine the relative rights of the parties to the stock.—Gassert v. Strong et al., 18.

Insane Persons—Divorce—Personal Service.

2. In order to clothe the district court with jurisdiction in a suit for divorce brought by the wife against her insane husband, summons must have been served upon the latter personally. (Revised Codes, sec. 6519, subsecs. 5, 7.)—State ex rel. Happel v. District Court, 166.

Service—Nonresidents—When Complete—Default—Premature Judgment—Vacation.

3. A nonresident of the state, when personally served with summons together with a copy of the complaint, in lieu of the publication and mailing, after an order of publication has been made (Revised Codes, sec. 6521), has the full period of four weeks and twenty days in which to make his appearance; therefore, where a default was entered twenty-two days after a nonresident had been so served, the judgment was premature, and the action of the court in vacating the judgment, on motion, for that reason, was correct.—McLean v. Moran, 298.

SUPERVISORY CONTROL.

New Trial—Service of Notice—Deficiency in Law—Supervisory Control.

1. Appeals being only allowed under such regulations as may be prescribed by law (Constitution, Article VIII, section 15), and the law not having made provision for the appointment, temporarily, of some one upon whom service of notice of an appeal from an order granting a new trial could be made in place of an adverse party who had died after the order was made, the supreme court, on application for writ of supervisory control, looking to the annulment of the order, cannot grant relief. The deficiency in the law in this respect can be supplied only by legislative, not judicial, action.—State ex rel. Cohn v. District Court et al., 119.

SURETYSHIP.

See Landlord and Tenant.

SURPLUSAGE.

1. Indorsement on ballot, by election judges,—see Elections, 4.
2. Signature of judge to minute entry, made by clerk,—see Probate Proceedings, 5.
3. Statutes, plurality of subjects,—see Statutes and Statutory Construction, 10.

SURVIVAL STATUTES.

See Personal Injuries, 62-64.

TAX DEEDS.

Quieting Title—Suit in Equity.

1. An action brought by a land owner under the provisions of section 6870, Revised Codes, to quiet the title to premises sold for delinquent taxes, is one in equity.—Larson v. Peppard, 128.

Same—Condition Precedent to Maintaining Action.

2. *Held*, that the maxim, "He who seeks equity must do equity," applies in an action by a land owner to quiet title to land sold for de-

linquent taxes, and that, as a condition precedent to maintaining his action, the plaintiff will be required to pay to the tax deed holder the amount of taxes which plaintiff should have paid, even conceding that, by reason of irregularities, the sale did not divest the owner of title, and no action could have been maintained by the purchaser to recover back the amounts paid by him, and although the rule of *caveat emptor* applies to purchases at delinquent tax sales.—Larson v. Peppard, 128.

Same—Decree—Interest.

3. The action by the land owner above referred to, not having been one to redeem from a tax sale, the court erred in allowing interest at the rate of two per cent per month from the time the delinquent taxes were paid by defendant. Interest at the legal rate only was recoverable.—Larson v. Peppard, 128.

Same—Form of Decree.

4. The court decreed that the plaintiff land owner's title to land, sold for delinquent taxes, be quieted, subject to a lien in favor of defendant for the amounts paid by him. The better practice in a case of this kind *held* to be, for the court to enter an order requiring plaintiff to make payment to defendant of the sums paid by the latter, with interest, within a reasonable time, the decree quieting title to be made upon payment, otherwise relief of any kind whatever to be denied plaintiff.—Larson v. Peppard, 128.

TAXES.

See License Taxes.

TENDER.

See Probate Proceedings, 9.

THREATS.

See Criminal Law, 54, 55.

TRANSCRIPT.

See Record on Appeal.

TRUSTS.

Action *Quasi in Rem*—Summons—Service by Publication—Jurisdiction.

1. An action against a nonresident holding the legal title to corporate stock, in the possession of a third person in the state, to establish and enforce a trust therein, is one *quasi in rem*, and service by publication was sufficient to enable the district court to determine the relative rights of the parties to the stock.—Gassert v. Strong et al., 18.

Constructive Fraud—Complaint—Sufficiency.

2. A complaint in an action to have one of several defendants declared trustee *ex maleficio* for plaintiff's benefit, for an alleged conspiracy to defraud the latter out of his property, examined, and *held* to state a cause of action.—Gassert v. Strong et al., 18.

Same—Fraud—Burden of Proof—Presumptions.

3. Where, in an action to have one of several defendants declared trustee *ex maleficio*, it appeared that plaintiff, who was indebted to defendants in a large amount, and had given them mortgages on his property to secure the debt, had relinquished his equity of redemption on valuable mining property, to one of them while in a weak mental con-

dition resulting from habitual intemperance, which was known to defendants and contributed to by one of them furnishing him with liquor, and while under a misapprehension as to the status of his accounts with defendants and in a state of ignorance of business generally and of the value of the property, a presumption arose against the *bona fides* of the transaction, and the burden was upon defendants to show that no unfair advantage was taken of plaintiff and that an adequate price was paid for the property.—Gassert v. Strong et al., 18.

Same—Mortgagors and Mortgagees—Transactions Between—How Viewed.

4. Where the relation of mortgagor and mortgagee has once been established, any subsequent arrangement by which the mortgagor's equity of redemption is sought to be transferred to the mortgagee will be viewed with distrust, and the original relationship of mortgagor and mortgagee held to exist unless it clearly appears that the transaction was perfectly fair and that no advantage was taken of the mortgagor by reason of his indebtedness.—Gassert v. Strong et al., 18.

Trustee and *Cestui Que Trust*—Transactions Between—Burden of Proof.

5. Where, in addition to mortgages to secure indebtedness, absolute deeds to the property were delivered as further security, the relationship of trustee and *cestui que trust* arose between the debtor and creditor, and the burden was cast upon defendant in an action assailing the *bona fides* of the transaction, to show that, when the *cestui que trust* relinquished his rights to defendant, the transaction was fair, that an adequate consideration was paid, that there was no fraud of concealment, and that the *cestui que trust* acted with full information relative to the status of the property. The presumption is against the transaction.—Gassert v. Strong et al., 18.

UNDERTAKINGS ON APPEAL.

See Appeal and Error, 3, 5, 6, 35-37.

VARIANCE.

See, also, Failure of Proof.

Personal Injuries—Street Railways—Immaterial Variance.

1. Where in a personal injury action against a street railway company the complaint alleged that plaintiff in attempting to board a street-car was injured by the car suddenly moving *forward*, and the evidence revealed the fact that he was thrown from the car by a *backward* movement, and it did not appear that defendant was misled or its counsel surprised by this technical departure in the proof, the court properly overruled a motion for a new trial on the alleged ground of variance. (Revised Codes, sec. 6585.)—Robinson v. Helena L. & Ry. Co., 222.

Question not Raised on Motion for New Trial—Effect.

2. A claim of variance between the pleadings and proof, which was not called to the trial court's attention on a motion for new trial, may not be urged for the first time on appeal as error in denying the motion.—Robinson v. Helena L. & Ry. Co., 222.

VERDICTS.

Form of,—see Personal Injuries, 74.

New Trial—Insufficiency of Evidence—Duty of Court.

1. If, on motion for a new trial, the court concludes that the verdict is not supported by the evidence, it is its duty to set it aside.—Garwood v. Corbett et al., 364.

Excessive—Remission of Excess—New Trial.

2. Where the jury returned a verdict for plaintiff for more than double the amount he was entitled to recover under the most favorable aspect of his testimony—thus evincing bias and prejudice—the trial court properly granted a new trial, and was not obliged to refuse a retrial in case plaintiff consented to a remission of the excess.—Garwood v. Corbett et al., 364.

Personal Injuries—Reasonableness of Verdict.

3. Where plaintiff, a farmer sixty-eight years of age, sustained a dislocated shoulder by a fall into an open cellarway in a public store, was disabled from thereafter attending to his business, and suffered much physical pain, a verdict in his favor for $941.70 was not excessive.—Montague v. Hanson, 376.

VICE-PRINCIPAL.

See Personal Injuries, 37.

WAIVER.

By answering,—see Pleading and Practice, 16.

Account Stated—Reopening—Mistake.

1. Where plaintiff, having delivered a large quantity of grain to defendant milling company, agreed to a settlement of accounts between himself and defendant, and receipted the account with full knowledge that he had reason to believe that owing to an alleged defect in defendant's scales the latter received more grain than the scales indicated, and there was not any evidence that he had been misled by defendant's agent, he will be held to have waived any claim to a reopening of the account on the ground of error or mistake.—Johnson v. Gallatin Valley Milling Co., 83.

Causes of Action—Misjoinder.

2. The objection that there is a misjoinder of causes of action must be made by answer or demurrer; if not so made, it is deemed waived.—Forsell v. Pittsburgh & Mont. Copper Co., 403.

Same—Election.

3. Where the objection to a misjoinder of causes of action was waived, an order refusing to compel plaintiff to elect on which cause of action he would proceed was proper.—Forsell v. Pittsburgh & Mont. Copper Co., 403.

Statute of Limitations—Pleading.

4. Under section 6475, Revised Codes, the question whether an action is barred by the statute of limitations can be raised only by answer. The defense may be waived by failure to interpose it.—State ex rel. Kolbow v. District Court, 415.

Partnership—Fictitious Name—Statutory Provisions—Disability to Sue.

5. Where the fact that plaintiffs were copartners did not appear from the face of the complaint, and the objection that they had no legal capacity to sue inasmuch as they were doing business under a fictitious name and had failed to file the certificate required by section 5504, Revised Codes, was not taken by answer (*Id.*, sec. 6538), defendants will be deemed to have waived the objection; and the fact that they did not know that plaintiffs were partners until after one of their witnesses had testified to that effect was immaterial, since it was not too late then to ask leave to amend the answer so as to raise the question.—Wilson et al. v. Yegen Bros. et al., 504.

WATERS AND WATER RIGHTS.

See, also, Contempt, 2.

Appropriation—Evidence—Insufficiency.

1. Evidence adduced by plaintiff in a suit to determine water rights, *held* insufficient to warrant a decree that plaintiff and her predecessor had appropriated a certain number of inches of water at a spring, where it did not appear when the water so appropriated was first used by such predecessor, when he dug a ditch by which it was sought to divert the water, when the water was applied for certain power purposes, or whether he did anything toward making an appropriation, other than the filing of a notice of appropriation.—Hilger v. Sieben et al., 93.

Appropriation on Private Property.

2. Neither sections 2339, 2340, United States Revised Statutes, nor sections 4840 *et seq.*, Revised Codes, regulating the acquisition of the use of water by appropriation, have authorized, or could authorize, a person to go upon the private property of another for the purpose of making an appropriation, except by condemnation proceedings.—Prentice v. McKay et al., 114.

Appropriation—Statutes—Apply to Public Lands Only.

3. Sections 4840-4891, Revised Codes, regulating the acquisition of the use of water by appropriation in this state, apply only to appropriations made on the public lands of the United States or of the state, and to such as are made by individuals who have riparian rights either as owners of riparian lands or through grants from such owners.—Prentice v. McKay et al., 114.

Manner of Acquisition on Private Lands.

4. One may not acquire a water right on the land of another without acquiring an easement in such land, created either by operation of law, by an instrument in writing or by prescription.—Prentice v. McKay et al., 114.

Appropriation on Private Property—License—Revocation.

5. Where the record on appeal in a water right contest failed to disclose that plaintiff in making an appropriation of water upon the lands of defendant had resorted to condemnation proceedings or received a grant of an easement in that regard or acquired it by adverse user, plaintiff had only a license, which, not having been one coupled with an interest or one for which a valuable consideration had been paid, was revocable at the pleasure of the licensor or his successor in interest.—Prentice v. McKay et al., 114.

License—Revocation—What may Constitute.

6. The action of a licensor in obstructing the use of water appropriated on his lands by means of a license not coupled with an interest or acquired for a valuable consideration, amounted to a revocation of the license.—Prentice v. McKay et al., 114.

Placer Mining—Recapture of Water.

7. Water used for placer mining purposes is subject to recapture and appropriation by farmers on the stream below.—Head et al. v. Hale et al., 302.

Change of Use—When not Permissible.

8. While a person entitled to the use of water may change the point of its diversion and use it for other purposes than that for which it was originally appropriated, this may not be done if persons on the stream below him are injured thereby; hence where water had been appropriated for placer mining purposes, the successors of the appropriator could not so change its use as to deprive lower appro-

priators of their rights, theretofore acquired, in the use of it for irrigating purposes.—Head et al. v. Hale et al., 302.

Abandonment—Subsequent Appropriation—Title—Relation Back.

9. Where upon the death of one who had held public lands under a squatter's right and appropriated water for placer mining purposes, there was no one to take the land under the laws of succession or by devise, and the premises thereafter remained without a claimant or owner for about two years, when others, not in privity with the original occupant, went into possession as upon unoccupied public lands for mining purposes, their rights to the use of the water did not relate back to the date of the appropriation made by the decedent, but had their inception as of the date of their entry, even though they repaired and used the ditches of the original claimant.—Head et al. v. Hale et al., 302.

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